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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 643

SAMUEL BAILEY, ET AL.,

Appellants,

—v.—

JOE T. PATTERSON, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

JURISDICTIONAL STATEMENT

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SAMUEL BAILEY, ET AL.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, entered on November 17, 1961, which denied appellants' application for preliminary injunctions against the Attorney General of the State of Mississippi, the City of Jackson, Mississippi, the Mayor, Commissioners and Chief of Police of the City of Jackson, the Jackson Municipal Airport Authority, the operator of a restaurant under a lease from the Jackson Municipal Airport Authority, and several common carriers, namely, Continental Southern Lines, Inc., Southern Greyhound Lines a division of the Greyhound Corporation, Illinois Central Railroad, Inc., and Jackson City Lines, Inc. Appellants sought injunctive relief to restrain appellees from continuing to enforce racial segregation on transportation facilities pursuant to Sections 2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786-01, 7787 and 7787.5 of the Code of Mis-

sissippi of 1942. Appellants also sought to restrain appellee law enforcement officials from continuing to enforce such segregation by enforcing an ordinance of the City of Jackson adopted January 12, 1956 and by acting under color of Sections 2087.5, 2087.7 and 2089.5 of the Mississippi Code of 1942. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below

The majority opinion of Judges Mize and Clayton and the dissenting opinion of Judge Rives are not yet reported and are reprinted in the Appendix hereto at pages 1a, 32a, *infra*.

Jurisdiction

This suit was brought in the United States District Court for the Southern District of Mississippi, Jackson Division, under 28 U. S. C. Sections 2281, 2284 to secure preliminary and final injunctions against the Attorney General of the State of Mississippi, the City of Jackson, Mississippi, the Mayor, Commissioners and Chief of Police of the City of Jackson, the Jackson Municipal Airport Authority, the operator of a restaurant under a lease from the Jackson Municipal Airport Authority, and several common carriers, namely, Continental Southern Lines, Inc., Southern Greyhound Lines a division of the Greyhound Corporation, Illinois Central Railroad, Inc., and Jackson City Lines, Inc. Appellants sought injunctive relief to restrain the appellees from continuing to enforce racial segregation pursuant to Sections 2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786-01, 7787 and 7787.5 of the Code of Mississippi of 1942. Appellants also sought to restrain ap-

pellee law enforcement officials from continuing to enforce racial segregation by enforcing an ordinance of the City of Jackson adopted January 12, 1956 and acting under color of Sections 2087.5, 2087.7 and 2089.5 of the Mississippi Code of 1942. The order of the District Court was entered on November 17, 1961 and Notice of Appeal was filed in that court on November 21, 1961. On December 5, 1961, appellants presented to this Court an application for a stay injunction pending appeal. On December 18, 1961, this application was denied.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. Section 1253 which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Bryan* v. *Austin*, 354 U. S. 933. There this Court took jurisdiction of and vacated a similar order;[1] likewise, in *NAACP* v. *Bennett*, 360 U. S. 471, this Court

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[1] The Order in the *Bryan* case, which is on file in this Court, No. 931, October Term, 1956, provided:

"... it is ordered that the case be retained and remain pending upon the docket but that proceedings therein be stayed to permit the plaintiffs a reasonable time for the exhaustion of state administrative and judicial remedies, after which such further proceedings, if any, will be had by this court as may then appear proper in the premises." (Jurisdictional Statement, page 43a.) There was no statement that the injunction was "denied."

vacated a similar order, and remanded the case to the trial court.[2]

There appears to be no question but that stay orders issued by three judge district courts applying the abstention doctrine in cases where injunctive relief has been sought are directly appealable to this Court.[3] Cf. *Gov't & Civic Employees Organization Com.* v. *Windsor*, 347 U. S. 901, aff'd 116 F. Supp. 354 (N. D. Ala. 1953) (Order reprinted at 146 F. Supp. 214, 215).

While the order in *Windsor, supra*, which was affirmed here, did recite that "the final relief for which plaintiffs prayed in their complaint is hereby denied," before reciting that jurisdiction was retained pending state court construction of the statute, it is obvious that the actual legal operation and effect of that order was the same as the effect of the abstention orders in the *Bryan* case, *supra*, the *Bennett* case, *supra*, and in the instant case, none of which contained the words injunction "denied". See also *Glen Oaks Utilities Inc.* v. *The City of Houston*, 280 F. 2d

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[2] The Order in the *Bennett* case is on file in this Court as No. 757, October Term 1958, and it provided:

> "On this day, pursuant to the opinion of the Court rendered by Judge Sanborn, it is ORDERED, That the motion for a stay of proceedings filed herein by the defendant, Bruce Bennett, Attorney General of the State of Arkansas, and joined in by certain other defendants, be, and the same is, granted, and that this Court will retain jurisdiction of this cause until efforts to obtain an appropriate adjudication in the state courts have been exhausted."

[3] The only stay orders issued by three-judge courts which might not be appealable are those issued pursuant to Title 28, §2284 requiring a stay in those instances where the state courts have stayed enforcement of statutes attacked as unconstitutional pending a state court test, and perhaps also stay orders which are merely a procedural step (for example a short continuance) in the exercise of the inherent power of a court to control the progress of a cause. Cf. *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, 382.

330, 333 (5th Cir. 1960); *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188, 192.

Questions Presented

The following questions are presented by this appeal:

1. Whether the court below, in an action to enjoin enforcement of Mississippi statutes and an ordinance of the City of Jackson, requiring racial segregation on common carriers and in common carrier waiting room and rest room facilities as contrary to the Fourteenth Amendment to the United States Constitution, erred in refusing to issue a preliminary injunction.[4]

2. Whether the court below erred in refusing to enjoin the restaurant-lessee in the Jackson Municipal Airport from refusing to serve and from segregating Negroes as contrary to the Fourteenth Amendment?

3. Whether the court below erred in refusing to enjoin the Jackson Mississippi Airport Authority, Inc., from continuing to enforce, as contrary to the Fourteenth Amendment a policy, practice, custom, and usage of segregation, including but not limited to the airport restaurant, rest rooms, and drinking fountains?

4. Whether the court below erred in refusing to enjoin, as contrary to the Fourteenth Amendment all prosecutions begun in the courts of Mississippi after the filing of the original complaint in this action of persons arrested and charged with violation of Sections 2087.5, 2087.7 and 2089.5

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[4] Mississippi Code (1942) Title 11, §§2351, 2351.5 and 2351.7, and Title 28, §§7784, 7785, 7786, 7786-01, 7787 and 7787.5, appended hereto at pages 21a *et seq.*, *infra*.

of the Mississippi Code (1942) and all future arrests for purportedly violating the state's breach of the peace and disorderly conduct statutes of persons peacefully using transportation facilities in violation of Jackson and Mississippi segregation requirements?[5]

5. Whether the court below erred in refusing to enjoin appellee public officials from, contrary to the Fourteenth Amendment, posting signs, designating facilities for colored passengers exclusively and facilities for white passengers exclusively, on doors, walls, sidewalks, and other places connected with stations, terminals, depots, and other passenger facilities and services?

6. Whether appellants herein also have been denied rights secured by the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution and by the Interstate Commerce Act, Title 49 United States Code, Section 3(1) and 316(d).

7. Whether the court below erred in applying the doctrine of equitable abstention to the facts of this case?

Statutes Involved

Sections 2087.5, 2087.7, 2089.5, 2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786-01, 7787, 7787.5 of the Code of Mississippi, 1942, reprinted herein at pages 21a *et seq.*, *infra*. An ordinance of the City of Jackson, adopted January 12, 1956 and recorded in Minute Book "FF," page 149, is reprinted at page 67a, *infra*.

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[5] Mississippi Code (1942) Title 11, §§2087.5, 2087.7 and 2089.5 appended hereto at pages 17a *et seq.*, *infra*.

Statement of Facts

Methods by which Mississippi and the City of Jackson enforce segregation in transportation

Mississippi has required and enforced racial segregation in intrastate and interstate transportation and related terminal facilities by a diversified arsenal of weapons. The overriding state policy is expressed in 17 Miss. Code Ann., Section 4065.3:

> The entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor . . . mayor . . . chiefs of police, policemen . . . be and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition . . . and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 . . . and to prohibit by any lawful, peaceful, and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government . . .

More specific Mississippi statutes exclusively govern transportation. Section 2351, Miss. Code (Segregation on railroads):

> If any person or corporation operating a railroad shall fail to . . . secure separate accommodations for

the white and colored races, as provided by law, or if any railroad passenger conductor shall fail to assign each passenger to the car or compartment of the car used for the race to which the passenger belongs he or it shall be guilty of a misdemeanor . . .

Section 2351.5 (Segregation in rail and bus terminals):

Every railroad company, bus company or other common carrier for hire owning, maintaining or operating a passenger depot . . . shall cause to be constructed and maintained . . . two . . . rest rooms . . . : "Rest Room white female only in Intrastate Travel" and likewise two . . . rest rooms . . . for colored passengers . . .

Section 2351.7 (Segregation of intrastate passengers in rail, bus, air terminals):

1. Any person traveling in intrastate travel by rail, bus, airline or other common carrier for hire who knowingly or wilfully enters or attempts to enter the waiting room not marked and provided for persons other than his or her race as required by law shall be guilty of a misdemeanor . . .

2. No white person shall enter, frequent, occupy or use the colored waiting rooms of any depot, bus station or terminal when such waiting room is marked in bold letters as required by law and no colored person shall enter, frequent, occupy or use the white waiting room of any depot, bus station or terminal when same is marked in bold letters as required by law . . .

3. No action . . . may be brought in any court of this state against any law enforcement officer for damages for false arrest of any passenger because of a violation of this act. . . .

Section 7784 (Segregation on railroads):

> Every railroad carrying passengers in this state shall provide equal but separate accommodations for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition to secure separate accommodations. . . .

Section 7785 (Segregation on railroads, buses, movable signs):

> All persons or corporations operating street railways and street or municipal buses . . . shall provide equal but separate accommodations for the white and colored races.
>
> Every common carrier by motor vehicle of passengers in this state . . . shall divide its passengers by the use of an appropriate sign 4 x 9 inches, for the purpose of, and in a manner that will suitably provide for a separation of the races, and all other buses and motor vehicles carrying passengers for hire in the State of Mississippi shall use a latticed movable partition extended from the top of the seat to the ceiling of the vehicle, said partition not to obstruct the view of the driver of the vehicle to secure such separate accommodations . . . the only remedy said passengers shall have for failure or refusal to carry them under such circumstances is the right to a refund of the cost of his ticket. . . .

Section 7786 (Operators empowered to assign seats):

> The operators of such street cars and street buses and motor vehicles . . . shall have power and are required to assign each passenger to the space or compartment used for the race to which such passenger belongs.

Any passenger undertaking or attempting to go into the space or compartment to which by race he or she does not belong, shall be guilty of a misdemeanor . . .

Section 7786.01 (Penalties):

Every person or corporation operating street railways and street or municipal buses . . . guilty of wilful and continued failure to observe or comply with the provisions of this act shall be liable to a fine of twenty-five dollars ($25.00) for each offense. . . .

Section 7787 (Penalties):

All officers and directors of street railway companies who shall refuse or neglect to comply . . . shall be deemed guilty of a misdemeanor . . .

Section 7787.5 (Segregated depots, signs):

. . . in such depots . . . there shall be constructed . . . for the white intrastate passengers a separate waiting or reception room, on each entrance to which shall be painted or shown in bold letters the following: "White Waiting Room, Intrastate Passengers"; and in such depot, bus station or terminal there shall be constructed, provided and maintained a separate waiting or reception room for the colored intrastate passengers, on each entrance to which shall be painted or shown in bold letters the following: "Colored Waiting Room Intrastate Passengers."

2. Any common carrier of passengers . . . which fails or refuses to comply . . . shall be liable in the penal sum of $1,000.00 (one thousand dollars) per day for each day of such failure. . . .

In addition to the state statutes, the City of Jackson also has enacted an ordinance requiring segregation in carrier terminals. The Jackson ordinance (Plaintiffs' Exhibit No. 31, R. 430) is based upon the state transportation segregation statute of 1956 (R. 445) and requires:

> All common carriers of persons which have heretofore provided and maintained separate waiting rooms . . . are hereby required to continue to maintain similar but separate waiting rooms . . .
>
> It shall be unlawful for any person of the white race to use . . . accommodations . . . provided for . . . persons of the colored races only.
>
> It shall be unlawful for any person of the colored races to use . . . accommodations provided for . . . the white race only.

The policy of the City of Jackson is, in the words of the Mayor (R. 441), one of segregation, but not described as such: "to bring happiness and peace and prosperity to everyone within our city. That has been done by a separation of the races, not segregation. We never refer to it as segregation." The city ordinance, he explained, "was patterned in 1956" on the state law (R. 442). The ordinance and the statute reflect the City of Jackson's policy (R. 442, 443, 444).

The Attorney General of Mississippi testified that "if conditions arise to such a point that I thought it was necessary to bring them [the state segregation laws] into effect. . . ." he would enforce them (R. 515; and see R. 522-523), but "I have not prosecuted anybody under those statutes; I haven't threatened to prosecute anybody" (R. 505-506). He has never announced or written an opinion recognizing the unconstitutionality of the segregation laws (R. 527-528). Other means are employed, however, to perpetuate segrega-

tion. For, as the Mayor of Jackson testified "there can be ordinances and there can be laws, but actual operation, actual interpretation and the actual performance under those laws are the controlling thing" (R. 444). "Since I have been Mayor I do not recall one incident where there has been an arrest under this ordinance or any segregation ordinance" (R. 442).

State and municipal segregation policy have been implemented in these ways: Police department orders manifested in signs—"WAITING ROOM FOR WHITE ONLY; WAITING ROOM FOR COLORED ONLY; BY ORDER OF THE POLICE DEPARTMENT"—posted on the sidewalks outside terminals by the police direct passengers to waiting room facilities for their respective races (R. 218 (railroad station), R. 259 (Greyhound), R. 277 (Trailways)). The interstate carriers admittedly operate under state and local segregation law in their terminals and, in addition to Police Department signs, have signs of their own stating "White Waiting Room—Intrastate Passengers" and "Colored Waiting Room—Intrastate Passengers" (R. 186 (railroad station), R. 258, 267-268 (Greyhound), R. 276-278 (Trailways); with respect to the airport see R. 206-207; 309-310).

Aboard the local buses movable signs, four by nine inches, are suspended from the top as on a curtain traverse rod (R. 604), as required by statute. The drivers have been instructed that if they pick up more Negroes than whites they should move the sign towards the front; if more whites than Negroes, to the rear (R. 605). Should a Negro sit out of place the driver is directed to stop the bus (R. 300). Otherwise he would face arrest (R. 616; and see R. 267, 287, 298).

The carriers have been obedient to the statutes, ordinances, and municipal and state policy under apprehension

that they will be enforced. One local Greyhound official wrote to the President of the Greyhound Corporation:

> "As you know the City placed a sign at the front of our Terminal designating the white waiting room, which was also done at Trailway and Railroad Stations at the same time and if the occasion should occur where the police does order the passengers that certain waiting room and they refuse I am sure they would be arrested as it happened several months ago at the Railroad Station.
>
> "As you know Mississippi has a law which requires us to place signs over our waiting rooms designating white and colored waiting rooms which we of course have at all our stations in Mississippi and I feel that the N.A.A.C.P. is hitting at these signs which read 'WHITE OR COLORED WAITING ROOMS INTRASTATE PASSENGERS'.
>
> "Since I have been in Jackson Mississippi which has been ten years we have never had any trouble with the local police treating our colored passengers rough, in fact it is very seldom that we see a police in the Terminal during the day but they do drop around at night on their regular rounds but bother no one unless they are out of line.
>
> *"I will say this, if the N.A.A.C.P. does start using the waiting rooms at any Terminal in Jackson Mississippi there will be plenty of trouble, because the police department has the backing of the City Officials and it appears they will go all the way to keep the races segregated in Mississippi."* (Emphasis supplied.) (R. 204; Plaintiffs' Exhibit No. 6).

If, however, the statutes were to be declared unconstitutional and their enforcement enjoined, the carriers aver that they would cease segregating (R. 677, 690, 697).

But, while the carriers and police enforce state law and policy, and while some Negroes who have made an effort to enjoy their right to non-segregated travel facilities have been subjected to physical violence under color of law and by private citizens (R. 316, 378), the principal mode for effecting state and municipal policy has been to arrest persons asserting these rights and to prosecute them for breach of the peace. Such arrests and prosecutions antedated the "Freedom Rides" and took place on local buses as well as with respect to interstate facilities after the "Freedom Rides," as appears *infra*.

Breach of the peace arrests have been effected pursuant to a policy worked out between the Attorney General of Mississippi and local law enforcement officers. The Attorney General testified:

> "Q. Did you discuss with the Chief of Police what steps he was going to take to preserve law and order? A. Yes, we discussed plans.
>
> Q. What were those plans? A. The plan was to do exactly what they did, first of all to keep down riot and disorder, and these arrests necessarily followed. They could have been easily avoided had your clients only wanted them avoided . . ." (R. 521).

The breach of the peace arrests were effected even though the only breach that occurred was in Mississippi's policy of segregation in travel. In connection with such arrests on a local Jackson bus a driver testified:

> "Q. Were there any white persons on the bus? A. Yes.
>
> Q. At the time these four Negroes were on the bus? A. Yes.
>
> Q. Was there any disturbance on the bus? A. Not a bit.

Q. Was there any disturbance outside the bus? A. No, not any" (R. 610).

In connection with the arrests in the various interstate terminals a police officer testified:

"Q. What were the Negroes doing that you arrested in there? . . . A. They came in the terminal.

Q. What did they do? A. They came in and some of them had seats and some of them stood.

Q. What else did they do? A. That is about all.

Q. Were they armed? A. I never found any of them armed.

Q. Were they loud? A. No.

Q. Did they use any curse words? A. No.

Q. Did they strike anybody? A. No.

Q. Did they threaten anybody? A. No.

Q. Did you arrest them? A. I sure did.

Q. For what? A. Because their presence provoked people and caused them to become disturbed, and I felt it best to maintain law and order and to order them to leave there. When they refused to obey my order, they were arrested.

Q. Would you explain what you mean by 'their presence there provoked people'? A. Well, as I stated earlier, we had advance notice that they were coming to Jackson to create an incident similar to what had happened in other cities, and my duty there was to maintain law and order, and I felt it best to get the root of the trouble out of there, and that is when I ordered them to leave.

Q. What did they do in violation of law and order? A. When I ordered them to leave, they just stood there, as though they hadn't heard me say a word. I repeated that order several times, and they refused to obey, and that is when I arrested them" (R. 532-534).

Parties

Defendants. The defendants are the City of Jackson (which requires segregation in travel and terminal facilities through its ordinances and by its police department orders and whose law enforcement officers, chief of whom is its Mayor (R. 431-432) are empowered to enforce the state segregation laws and the state breach of the peace statutes which, on this record, systematically are the means by which segregation is effectuated in Jackson), the Mayor of the City of Jackson and two of its Commissioners; the Jackson Municipal Airport Authority (R. 329), which is within the city limits of Jackson (R. 334), and the restaurant of which is leased on a month to month basis—which extends a prior lease—to the defendant restaurant operator, Cicero Carr (R. 370, 372; Plaintiff's Exhibit 29); Jackson City Lines, a Mississippi corporation which operates local buses under franchise granted by the City of Jackson (R. 451); the Illinois Central Railroad, Continental Southern Lines (Trailways), the Greyhound Corporation, all of which maintain terminals in the City of Jackson for the serving of interstate and intrastate passengers who use their respective trains and buses; and the Attorney General of Mississippi. The United States was represented as *amicus curiae*.

Plaintiffs. The named plaintiffs are residents of Mississippi and Negroes who have used the various travel facilities involved. Plaintiff Broadwater has used the Jackson City Lines, Illinois Central Railroad, Greyhound Buses, Continental Trailways Buses, and the Jackson Municipal Airport (R. 181, 206). He has been segregated in the use of these various carriers and their terminals (R. 185-189, 192-194, 195, 206, 207, 208-210) but made no effort to violate the segregation statutes, ordinance, or police depart-

ment orders before bringing this suit and was never arrested or prosecuted (R. 215).

Plaintiff Broadwater as early as 1957 wrote to the carriers, complaining of their segregation policy, but to no avail (Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8). Indeed, his complaint provoked Plaintiffs' Exhibit No. 6, quoted in part, *supra* (p. 13).

Plaintiff Jacob has used the Greyhound Buses, Illinois Central Railroad, Trailways Buses, and the Jackson City Lines. He has been directed by appropriate signs posted by the carriers and by the order of the police department to confine himself to the use of facilities for Negroes only (R. 220-225). Like plaintiff Broadwater, he has tested the validity of segregation only by this suit and has not submitted to arrest and prosecution (R. 226). Should this suit, however, eventuate in a judgment according him the right to employ nonsegregated travel accommodations, he will exercise the right (R. 230).

Plaintiff Bailey also has traveled Trailways Buses, Illinois Central Railroad, Greyhound Buses, and the Jackson City Lines, and he too has been directed by the signs posted by the carriers as well as those posted by the police. So far as arrest and conviction for violating segregation law is concerned, his situation is the same as that of the other named plaintiffs (R. 230-237).

Numerous witnesses, members of the class (see Rule 23 (a)(3) Federal Rules Civil Procedure), on whose behalf this action is prosecuted, testified concerning the means by which racial segregation has been imposed upon them and others in the use of the various travel facilities which are the subject of this suit. Witness Evers testified that he uses the airport fifteen to twenty times a year and that segregation was imposed upon him by means of various

signs in the restrooms, at the fountains, and at the restaurant (R. 312-315), that on a Trailways Bus when he did not move from a front seat the bus was stopped, the police were summoned and later he was physically assaulted by a private citizen (R. 316); that he had witnessed other Negroes board the bus and that they were ordered to the back (R. 324).

Witness Grayson testified that on April 19, 1961, she was arrested for breach of the peace for sitting on the front seat on a Jackson City bus (R. 342, 347, 353).

Witness Armstrong testified that on June 23, 1961, he was arrested for entering the white intrastate passenger waiting room of the Trailways Bus Company. He was convicted of breach of the peace, although there was neither fighting, loud talk, cursing or any other disturbance involved (R. 353, 358-361, 364, 367).

Witness Frazier testified that he was ordered by the driver to the rear of a Trailways bus in Columbus, Mississippi but declined to move (R. 376), and in Winona, Mississippi was beaten to unconsciousness by the sheriff and his deputies (R. 378) who told him that he had no business sitting in the front of the bus (R. 379). Frazier was charged with disturbing the peace (R. 381-383).

Witness O'Neal testified that while she was riding a Greyhound bus between Jackson and Clarksdale, Labor Day 1961, she was asked by the driver to move to the Negro section and a police officer removed her and took her to the police station where she was kept four hours, then released (R. 397-398, 402-403).

Witness Jones testified that in riding the Illinois Central from Clarksdale to Memphis, August 23, 1961, she was arrested for using the white waiting room (R. 410-415).

Other witnesses testified similarly to the enforcement of segregation on carriers and in terminals (R. 418, 423).

Plaintiffs introduced into evidence Exhibits Nos. 32, 33, 34, and 35, four volumes of approximately 190 affidavits and judgments of breach of the peace convictions of other members of the class on whose behalf this suit seeks relief, persons arrested in waiting rooms of defendant carriers (R. 569). These warrants are of arrests described in the testimony of Captain of Police J. L. Ray, who discussed them in response to the following question: "I would like to . . . ask you if in the last six months you have arrested any Negroes in that waiting room?" (R. 532 and see 536, 541-542, 544). He described the arrestees conduct as entirely peaceable. See extract from his testimony, *supra*, p. 15.

The named plaintiffs and various witness members of the class were aware of the policy of the State and municipality to arrest and prosecute for breach of the peace persons who violate segregation statutes, ordinances, and customs. Plaintiff Bailey personally witnessed a co-worker arrested for sitting in the white section of a bus (R. 250 and see R. 346). Others, as described, *supra*, were themselves arrested.

The class on behalf of whom this suit seeks relief

The original complaint filed on June 9, 1961, prayed for preliminary and permanent injunctions enjoining defendants from:

a) continuing to enforce certain statutes of the State of Mississippi requiring racial segregation on common carriers, in waiting rooms used by common carriers, and rest room facilities maintained by common carriers, i.e., Title 11, Sections 2351, 2351.5 and 2351.7, and title 28, 7784, 7785, 7786, 7786-01, 7787, 7787.5, Mississippi Code An-

notated (1952) and any other statute of the State of Mississippi requiring or permitting such segregation.

b) continuing to enforce ordinances of the City of Jackson, Mississippi, requiring racial segregation in waiting rooms and rest room facilites owned and/or maintained and utilized by common carriers.

c) continuing to enforce a policy, practice, custom, regulation or usage, under color of state law of city ordinance, of segregating Negro and white passengers on common carriers and in the facilities and services of the depots, stations, terminals, owned and/or utilized by carriers in connection with their businesses of transporting interstate and intrastate passengers for hire.

d) continuing to enforce a policy, practice, custom and usage of segregation in the facilities and services of the Jackson Municipal Airport including but not limited to the airport restaurant owned and operated by the City of Jackson or owned and leased by the City of Jackson to a private individual for the benefit of airline passengers and the general public.

e) continuing to arrest, harass, intimidate, threaten or coerce the plaintiffs and members of their class in connection with the exercise of their federally protected right to use interstate and intrastate transportation facilities and services without segregation or discrimination against them solely because of race and color.

The amended complaint contained a similar prayer with an additional paragraph "f":

f) continuing to post, or permit to be posted, signs designating facilities set aside for colored and white passengers on the doors, walls, sidewalks or other places connected with or in the terminals, depots, stations, rest rooms,

waiting rooms, lunch rooms or any other passenger facility or service.

Thus the original and amended complaints were broad enough to cover all of the methods employed by the state and city to enforce segregation—all of which methods threaten the named plaintiffs. At the hearing, however, with respect to enjoining state court prosecutions, plaintiffs pressed only for an injunction against the proceedings commenced subsequent to the time federal jurisdiction attached in this suit (under the exception contained in 28 U.S.C., §2283)[6] which was on June 9, the date of the filing of the complaint. The class, therefore, consists of persons[7] threatened by the segregation statutes or ordinances and practices (including arrest and prosecution for breach of the peace) of the State and the City of Jackson and who have been subjected to segregation by the carriers and their terminals. The named plaintiffs fall in all of these categories.

They have been and are continuously threatened by all the techniques of imposing segregation employed by the City of Jackson and State of Mississippi in all of the travel facilities and terminals involved in this case. While they have not themselves been arrested and prosecuted the threat against them is immediate. Indeed, as of the filing of this suit, those persons arrested and prosecuted after June 9, had—like the named plaintiffs—themselves not been arrested and prosecuted.

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[6] Section 2283 states that "a court of the United States may not grant an injunction to stay proceedings in a state court," except "where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

[7] The original complaint sought relief only on behalf of "Negroes" who were being segregated. The evidence demonstrated, however, that segregation was being enforced against white persons, especially those associated with Negroes (R. 318).

If the status (as a threatened but not arrested person) of any of the members of the class has been changed, it has been changed by the appellees state and city in the course of making arrests and pressing prosecutions after June 9, which impinge on the subject matter of this suit over which a federal court already had taken jurisdiction.

THE QUESTIONS ARE SUBSTANTIAL

I. State Compelled Racial Segregation in the Use of the Public Transportation Facilities of Common Carriers Is Clearly Repugnant to the Constitution and Laws of the United States.

The racial segregation laws of the State of Mississippi which have been attacked as unconstitutional and which are set forth in Appendix II to the opinion of the majority below, page 21a, *infra*, are clearly invalid under applicable federal constitutional and statutory law. The invalidity of state laws requiring racial segregation in interstate and intrastate commerce is so clearly established by prior decisions of this Court as not to present any real issue. *Gayle* v. *Browder*, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala. 1956); *Brown* v. *Board of Education*, 347 U. S. 483; *Morgan* v. *Virginia*, 328 U. S. 373; *Boynton* v. *Virginia*, 364 U. S. 454; *Baldwin* v. *Morgan*, 251 F. 2d 780 (5th Cir. 1958) and 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960); *Lewis* v. *Greyhound Corp.* (M. D. Ala. C. A. No. 1724-N, November 1, 1961, not yet reported). Indeed, Mississippi's segregation statutes were recently declared invalid in relation to an interstate carrier's facilities in McComb, Mississippi, *United States* v. *City of McComb* (unreported, S. D. Miss. C. A. No. 3215, November 21, 1961) (Circuit Judges Tuttle and Rives wrote the majority opinion; District Judge Mize

dissented). There is a similar recent decision affecting Greenville, Mississippi: *United States* v. *John J. Fraiser, County Attorney* (unreported, N. D. Miss. C. A. No. G-C-27-61, November 20, 1961) (Circuit Judges Tutle and Rives were in the majority; District Judge Clayton dissented). The last mentioned cases are actions brought by the United States to implement a recent order of the Interstate Commerce Commission relating to segregation in motor carrier facilities. I. C. C. Docket No. MC-C-3358, decided September 22, 1961; see Regulations adopted in 49 C. F. R., Part 180, Sections 180(a)(1), *et seq.*

Racial segregation by the Jackson Municipal Airport Authority and its restaurant-lessee is clearly unconstitutional "state action". *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Henry* v. *Greenville Airport Commission*, 284 F. 2d 631 (4th Cir. 1960); *Coke* v. *Atlanta*, 184 F. Supp. 579 (D. C. N. D. Ga.).

Enforcement of segregation by means of arrests and prosecutions for breach of the peace where the only breach is of segregation law or custom and defendants' only wrong was "their presence" (R. 534), has been held a violation of the Fourteenth Amendment by this Court in *Garner* v. *Louisiana*, —— U. S. ——, 30 U. S. L. Week 4070, Dec. 11, 1961, and see *Thompson* v. *City of Louisville*, 362 U. S. 199.

The actions of the appellee law enforcement officials in enforcing segregation in public transportation facilities are equally in violation of the Constitution and laws of the United States. State officers can no more enforce racial discrimination through their administration of laws, which do not require such discrimination, than they can do so in obedience to a legislative mandate to discriminate. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

It is settled that police officers acting to deny equal protection of the laws, with or without the approval of state

law, violate the Fourteenth Amendment. *Monroe* v. *Pape*, 365 U. S. 167. Public prosecutors are likewise subject to the inhibitions of the Fourteenth Amendment in their actions in conducting criminal cases. *Napue* v. *Illinois*, 360 U. S. 264.

Appellants seek to enjoin the continuation of the scheme or program of the appellee officers of the City of Jackson to enforce segregation by making arrests and conducting a series of vexatious multiple criminal prosecutions of persons who refuse to submit to their segregation requirements. This scheme and plan is an obvious violation of the Fourteenth Amendment and federal statutory rights of appellants and the members of the class they represent, and should have been enjoined for the reasons stated in the dissenting opinion of Judge Rives.

It should be reemphasized, particularly in the light of the majority's disposition of the case below, that there is no claim by appellants here that either of the disorderly conduct and breach of the peace laws, under which the prosecutions of persons who have refused to obey the segregation orders are brought, is unconstitutional on its face. Neither is there any request for, or issue necessitating, a construction of these laws. For the purposes of appellants' claim here there is no need even to determine whether, as a matter of state law, the disorderly conduct laws are applicable to the conduct of the persons arrested and prosecuted by the appellees. No matter how this question is ultimately decided, the members of appellants' class charged and prosecuted in furtherance of appellees' plan of arrest and prosecution will have been denied constitutional rights by having been subjected to the vexatious and unwarranted arrests and prosecutions. The evil which appellants seek to enjoin is the systematic use of the processes of the criminal law to arrest and prosecute every person who violates

appellees' segregation orders. Even if the persons arrested and prosecuted by appellees are eventually vindicated in the state courts (or in this Court on review of the criminal prosecutions), they will have been already subjected to the discriminatory scheme of penalizing persons who refuse to obey the segregation orders.

II. The Principles of Equitable Abstention Invoked by the Court Below Were Inappropriately Applied in This Case.

Appellants submit that the reliance by the court below upon principles of equitable abstention pending adjudication of the issues presented in this case by state courts, was not required or authorized by the applicable precedents. In brief, appellants submit that since there is no claim of the invalidity of the disorderly conduct laws involved here, and no necessity for their construction, the principle of abstention is inapplicable. This case involves no "preliminary guess" as to the meaning of the disorderly conduct laws, but rather, a claim that state officials are arresting people and prosecuting them to enforce segregation. Whether the disorderly conduct law does or does not authorize this conduct of the state officials is not decisive of the claim for relief from segregation enforced by the harassment program of appellees. This conduct is proscribed by the Constitution in either event. With regard to the state's segregation laws, the equitable abstention doctrine is equally inapplicable, for, as Judge Rives said below:

> "... *the segregation statutes are incapable of a valid construction.* No authority whatsoever may be found for the proposition that, where a state statute is clearly and unavoidably unconstitutional on its face, comity requires that state courts be allowed the privilege of

so declaring. Such a rule would be, not abstention, but abdication of our judicial function." (Emphasis in original.)

The denial of preliminary injunctive relief to avoid irreparable harm to the appellees' class (consisting of both the continued clear violation of their constitutional rights through maintenance of the segregation requirement, and the great injury suffered because of the continuation of the criminal prosecutions) was improper, even assuming that there was a need for state court clarification of an issue of state law. The court below relied heavily upon *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167, to support its abstention. But in the *Harrison* case both this Court and the trial court abstained only after being assured that the criminal laws there involved would not be enforced, and that plaintiffs would not suffer further injury, pending clarification of the state law issues (360 U. S. at 179; 159 F. Supp. 503, 534). And here, unlike *Harrison*, the actual prosecutions are proceeding against over 300 individuals. *Harrison* involved only threatened prosecutions.

III. Federal Judicial Power May Be Exercised to Enjoin State Criminal Prosecutions During the Pendency of a Federal Action on the Same Subject Matter.

Judge Rives' opinion below sets forth the principles governing the federal judicial power to enjoin state criminal prosecutions commenced during the pendency of a federal action on the same subject matter. The cases cited by Judge Rives support this doctrine. See, e.g., *Ex parte Young*, 209 U. S. 123, 161-162; *In Re Sawyer*, 124 U. S. 200, 211; *Truax* v. *Raich*, 239 U. S. 33, affirming, 219 Fed. 273 (D. Ariz. 1915). Judge Rives said:

> In terms of the anti-injunction statute, 28 U. S. C. §2283, it is a power "in aid of our jurisdiction" to prevent state courts from interfering with the determination of issues properly before the federal court. The propriety of granting such a request, however, is discretionary, and only the strongest equities will support such outright interference with state proceedings already commenced. I am of the opinion that such equities exist in this case.

Judge Rives' opinion also makes apparent the inadequacy of any remedy at law. He pointed out, among other reasons for this, that individual defendants in the state courts would have great difficulty in establishing the patterns or practices over extended periods which demonstrate in this record that racial discrimination was the basis of these arrests and prosecutions.

Douglas v. *Jeannette*, 319 U. S. 157, which held that federal courts as a matter of comity and equitable discretion should not interfere with state criminal proceedings and law enforcement officials when an adequate remedy is provided in the state proceedings for the protection and assertion of all constitutional rights is not to the contrary. As Judge Rives pointed out, the primary requirement of *Douglas* v. *Jeannette* is "that there be an adequate state remedy; that is not the case here". Cf. *Morrison* v. *Davis*, 5th Cir. 1958, 252 F. 2d 102, 103, wherein the Court stated:

> "This is not such a case as required the withholding of federal court action for reason of comity, since for the protection of civil rights of the kind asserted Congress has created a separate and distinct federal cause of action. 42 U. S. C. A. §1983. Whatever may be the rule as to other threatened prosecutions, the Supreme Court in a case presenting an identical factual issue affirmed

> the judgment of the trial court in the Browder case [Browder v. Gayle, D. C. Ala., 142 F. Supp. 707, aff'd 352 U. S. 903] in which the same contention was advanced. To the extent that this is inconsistent with Douglas v. City of Jeanette, Pa., 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, we must consider the earlier case modified."

As set forth *supra* pp. 16-22, the class on behalf of whom this suit was filed under Rule 23(a)(3), Federal Rules of Civil Procedure, consists of persons subjected to segregation in the City of Jackson and State of Mississippi in the various ways such segregation is imposed. This includes persons arrested and prosecuted for breach of the peace whose only wrong was to violate existing state required segregation patterns. See *Garner* v. *Louisiana, supra; Thompson* v. *Louisville, supra.*

While appellants have not pressed for relief against prosecution on behalf of those arrested prior to June 9, 1961, so far as persons arrested thereafter are concerned there is no reason why they should not be entitled to the fruits of any decree in this case. If the preliminary injunction prayed had been granted when originally sought almost all of these arrests and prosecutions could never have occurred. Moreover, any change in status from being an unarrested person to becoming an arrested and prosecuted person has been the doing of the *appellees,* not of the appellants. It is ironical in the extreme, that because of their own unconstitutional action appellees should claim that those against whom they are proceeding are not entitled to protection of any decree in this case, or that the named appellants, threatened by the same arrest and prosecution cannot raise this issue. As this Court held in *Evers* v. *Dwyer*:

> . . . We do not believe that appellant, in order to demonstrate the existence of an "actual controversy" over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability. See Gayle v. Browder, 352 US 903; 1 L ed 2d 114, 77 S Ct 145, affirming the decision of a three-judge District Court (Ala) reported at 142 F Supp 707.
> (358 U. S. at 204)[8]

In addition, the relationship between the named appellants and others whose rights are asserted herein and whom, it is submitted, the decree should protect, is sufficiently close that the rights of the latter may be raised by the litigation prosecuted by the former. *Barrows* v. *Jackson*, 346 U. S. 249; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *NAACP* v. *Alabama*, 357 U. S. 449; *Truax* v. *Raich*, 239 U. S. 33.

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[8] See also *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960); *Baldwin* v. *Morgan*, 251 F. 2d 780 (5th Cir. 1958).

IV. The District Court Abused Its Discretion.

The Court below abused its discretion in remitting appellants to state judicial remedies and in not granting the relief prayed by appellants. As Mr. Justice Brandeis has stated, the exercise of discretion "does not extend to a refusal to apply well-settled principles of law to a conceded state of facts," *Union Tool Company* v. *Wilson*, 259 U. S. 107, 112. Considering the uncontradicted facts and the clear law, the segregation statutes of the State of Mississippi are clearly unconstitutional; there was absolutely no justification to remit appellants to the State Courts and refuse to issue a preliminary injunction. As to the disorderly conduct and breach of the peace statutes, the Court below abused its discretion in remitting appellants to the State Courts and in failing to grant the relief prayed by appellants in that the Court failed to enjoin the systematic use of the processes of the criminal law to arrest and prosecute persons who violated appellees' segregation orders. The exercise of discretion "implies conscientious judgment, not arbitrary action," *Burns* v. *United States*, 287 U. S. 216, 222-223. As appellants' rights, guaranteed by the Constitution and Laws of the United States, would be violated regardless of the construction put on these statutes by the State courts, the Court below abused its discretion in not entering a preliminary injunction. The doctrine of abstention was improperly invoked since no construction placed on the state statutes in question would have avoided the constitutional issue pleaded and proved. *Harrison* v. *NAACP*, 360 U. S. 167, was improperly relied upon below as justifying abstention under the facts of this case. As full testimony had been taken, argument had and briefs submitted, the preliminary injunction should have also been made final.

We believe, therefore, that the questions presented by the appeal are substantial and that they are of public importance.

Respectfully submitted,

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Opinion of the United States District Court, Southern District of Mississippi

Filed November 17, 1961

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

Civil Action No. 3133

[SAME TITLE]

Before RIVES, *Circuit Judge,* and MIZE and CLAYTON, *District Judges.*

MIZE, *District Judge*:

The plaintiffs in this case are Samuel Bailey, Joseph Broadwater and Burnett L. Jacob, each of whom is an adult Negro citizen of the United States and the State of Mississippi, who filed their complaint herein on June 9, 1961. The defendants in the case as shown by the amended complaint are Joe T. Patterson, The City of Jackson, Allen C. Thompson, Douglas L. Luckey, W. D. Rayfield, Jackson Municipal Airport Authority, Continental Southern Lines, Inc., Southern Greyhound Lines, Illinois Central Railroad, Inc., Jackson City Lines, Inc., Cicero Carr. Each of the defendants has filed an answer to the amended complaint, setting out their defenses. The issues are clearly defined by these pleadings. The amended complaint was in substance a substitution of the original complaint.

It is the contention of the plaintiffs that Sections 2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786-01, 7787, and 7787.5 of the Code of Mississippi of 1942 are unconstitutional; that the defendants are seeking to enforce these statutes; and that a preliminary injunction should be issued enjoining the defendants and each of them and their successors from enforcing any of these statutes or any other statutes requiring racial segregation on common carriers or in the facilities maintained by common carriers. Plaintiffs further contend that the defendant, City of Jackson and its officials are enforcing an ordinance of the City of Jackson adopted January 12, 1956, and contend that this ordinance of the City is unconstitutional on its face, but that notwithstanding its unconstitutionality, the defendants, City of Jackson and its officials, have threatened to enforce this ordinance against the plaintiffs and members of their class. Plaintiffs further contend that the defendants and each of them, acting under color of the laws of the State of Mississippi and under color of Sections 2087.5, 2087.7 and 2089.5 of Mississippi Code of 1942, have pursued and will continue to pursue a policy and custom of segregation of negro and white persons on common carriers in the State of Mississippi unless restrained, and they contend further that they have no other speedy or adequate remedy at law other than by injunction. Plaintiffs pray for the organization of a three-judge court as required by Title 28 USC, Section 2284, and pray for the issuance of a preliminary and permanent injunction enjoining each of the defendants from enforcing or attempting to enforce any of the aforementioned statutes or any other statute of the State of Mississippi requiring segregation; pray for an injunction enjoining the City of Jackson or any of its officers from enforcing any of the

ordinances of the City of Jackson hereinabove referred to; to enjoin the defendants and each of them from continuing to enforce any policy or custom under color of State law or City ordinances of segregating negro and white passengers on common carriers or in facilities maintained by any common carrier, from continuing to enforce any policy or custom of segregating the races in the facilities and services of the Jackson Municipal Airport or its restaurant operated by Cicero Carr, and from continuing to arrest, intimidate or threaten to arrest members of their class in connection with the exercise of their Federally protected right to use inter and intra state transportation and services without segregation or discrimination because of their race.

The defendants and each of them in their answers deny that they are enforcing or attempting to enforce any of the statutes against the plaintiffs or any of their class because oftheir race. Defendants contend that this is the type of action wherein the Federal Court should abstain from passing on these statutes until the State courts have first had an opportunity to pass on its own laws and city ordinances.

All the defendants contend that no injunction should issue against either of the defendants. More specifically, the defendant Joe T. Patterson contends that this is not properly a class action; that the amended complaint raises factual and legal controversy involving unsettled questions of state law which should properly be decided first by the Supreme Court of Mississippi in order to avoid unnecessarily deciding constitutional questions, and that there is a full and adequate procedure existing in the state tribunals of the state for the plaintiffs to assert all of their rights and privileges claimed by this suit; and that none

of the laws of the State of Mississippi that are complained of in the amended complaint have ever been presented to the highest tribunal or any other court of the State of Mississippi for adjudication. The Attorney General further contends that in effect this suit against the Attorney General in his official capacity is an action against the State of Mississippi, which, under the provisions of the Eleventh Amendment to the Constitution could not be maintained without its consent, and further, that the complaint attacks the enforcement of parts of the criminal laws of the State of Mississippi which have been passed in the sovereign capacity of the State for the purpose of protecting all persons of the state against domestic violence, and undertakes to prevent the enforcement of the ordinances of the City of Jackson and to prevent the State officials of Mississippi from enforcing Sections 2087.5, 2087.7 and 2089.5 of the Mississippi Code of 1942. (These statutes are set out in Appendix I.) He contends that these statutes are constitutional and are not being unconstitutionally enforced. He further contends that this action constitutes an attempt to control the law enforcement officials of the City of Jackson, as well as the State of Mississippi in the exercise of their valid discretionary powers and authority.

The defendants, City of Jackson anl Allen Thompson, its Mayor, the Commissioners and Chief of Police contend that the amended complaint raises primarily factual issues and that the primary issue raised by the amended complaint involves the arrest of the so-called Freedom Riders under Sections 2087.5 et seq. of the Code of 1942 and that the arrest of the Freedom Riders was legitimate and in accord with these sections, and that these sections were not unconstitutionally enforced. They contend spe-

cifically that there was no effort to enforce segregation laws by the arrests, but simply to maintain law and order and to prevent breaches of the peace. They further contend that this Court should abstain from passing on the constitutionality of these Acts until passed upon by the Supreme Court of Mississippi and contend, also, that the City of Jackson is an agency of the State of Mississippi and, therefore, not subject to suit.

The defendants, Continental Southern Lines, Inc., Southern Greyhound Lines, Illinois Central Railroad, Inc., Jackson City Lines, Inc., Jackson Municipal Airport Authority and Cicero Carr contend that they have not caused the arrest of anyone and that they are not seeking to enforce the segregation laws of the State of Mississippi, and contend that no injunction should issue against them, for the reason that the plaintiffs have a full, complete and adequate remedy at law to redress any grievances they may have.

Briefly, these are the main contents of the respective parties as reflected by the pleadings in this case.

The majority of the Court has reached the conclusion that under the issues as raised by the pleadings in this case it is the duty of this court to abstain from passing on the issues, but retain the cause of action on its docket and remit the plaintiffs to the State Courts of Mississippi for a prior adjudication of the issues and of the scope and meaning of its own statutes as so defined. This Court should simply stay its hand until the adequate and proper remedies provided for by the statutes of the State of Mississippi should be exhausted. By this procedure the comity existing between the Federal Courts and the State Courts would be maintained without any serious injury to any-

one. With the exception of Sections 2351 and 7784,[1] the sections of the Mississippi Code complained of and the constitutionality of which is under attack herein have never been passed upon by the Supreme Court of Mississippi. These sections 2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786-01, 7787, and 7787.5 of the Mississippi Code of 1942 as amended are set out in Appendix II to this opinion. Before this Court should pass upon the constitutionality of these statutes in this particular case, wherein it is shown by the contentions of the parties that there will be factual issues as well as the constitutionality of the statutes involved, the courts of the State of Mississippi should be afforded an opportunity to pass upon them.

This equitable principle of abstention is well supported by the decisions of the Supreme Court of the United States, as well as by many of the decisions of the various Courts of Appeal and District Courts. It will not be necessary

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[1] The Mississippi Supreme Court in *Louisville, N. O. & T. R. Co.* v. *State*, 66 Miss. 662, 6 So. 203, held that the Mississippi Act of March 2, 1888, now Sections 2351 and 7784, Mississippi Code 1942, Recompiled, applied solely to commerce within the state and affirmed a conviction based on a violation of the Act. In affirming, the United States Supreme Court held, in *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 1889, 133 U. S. 587, that a state may require railroads to provide separate accommodations for the white and colored races without violating the commerce clause of the Constitution so long as the statute applies only to commerce within the state.

In 1912, the Mississippi Supreme Court held, in *Alabama & V. Ry. Co.* v. *Morris*, 103 Miss. 511, 60 So. 11, that Sections 4059 and 1351, Mississippi Code 1906, now Sections 2357 and 7784, applied to interstate travelers and was a reasonable exercise of the police power of the state, and, in 1919, the Mississippi Supreme Court held that Section 4059, Mississippi Code 1906, now Section 7784, Mississippi Code 1942, Recompiled, did not violate either the commerce clause of, or the Fourteenth Amendment to, the federal Constitution. *Illinois Central R. Co.* v. *Redmond*, 119 Miss. 765, 81 So. 115.

to refer to all the decisions that have adhered to this doctrine, but the quotations from a few of the leading cases will be decisive. Probably the one most nearly in point is the case of Harrison, Attorney General of Virginia, et al. v. National Association for the Advancement of Colored People, et al., 360 U. S. 167, in which it was held by the Supreme Court of the United States that the Federal Courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the State Courts have been afforded a reasonable opportunity to pass upon them. The Court said:

> "According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. * * *
>
> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts.' Matthews v. Rodgers, 284 U. S. 521, 525, as their 'contribution . . . in furthering the harmonious relationship between state and federal authority . . .' Railroad Comm'n v. Pullman Co., 312 U. S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression that the federal courts should

not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See e.g., Railroad Comm'n v. Pullman Co., supra; Chicago v. Fieldcrest Dairies, Inc., 316 U. S. 168; Spector Motor Service Inc. v. McLaughlin, 323 U. S. 101; American Federation of Labor v. Watson, 327 U. S. 582; Shipman v. DuPre, 339 U. S. 321; Albertson v. Millard, 345 U. S. 242; Government & Civic Employees v. Windsor, 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See Chicago v. Fieldcrest Dairies, Inc., supra, at 172-173.

"The present case, in our view, is one which calls for the application of this principle, since we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia Courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem."

The Court said, further: "We do not intimate the slightest view as to what effect any such determinations might have upon the validity of these statutes. All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a com-

plete product of the state, the enactment as phrased by its legislature and as construed by its highest court."

Just as was said by the Supreme Court of the United States, supra, we do not in this case undertake to pass upon any of the issues that have been raised, nor do we intimate whether the statutes are constitutional or unconstitutional, for the reason that the courts of the State of Mississippi should be permitted to pass upon these questions, uninfluenced by any adjudication or intimation of ours as to the statutes. We have given careful consideration not only to the opinion of the majority of the Court in that case and the governing rule announced by it, but we also have considered the thinking of Mr. Justice Douglas, who dissented, in which he was joined by the Chief Justice and Mr. Justice Brennan, whose opinion set out the history and doctrine, considering also the decisions cited in the dissenting opinion. However, as a general rule, every lawsuit must be determined by the issues raised in the pleadings in the particular case, and it is our view that in this particular case, where the constitutionality of the statutes of Mississippi is questioned and has never been passed upon by the highest court of the State, a sound discretion requires that the federal courts abstain. In the case of Spector Motor Co. v. McLaughlin, 323 U. S. 101, the Supreme Court used this language:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and

more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." (Citing authorities).

In connection with Harrison v. N. A. A. C. P., supra, see the many authorities cited in the dissenting opinion of Judge Sterling Hutcheson, 159 Fed. Sup. 535, with reference to abstention. In that exhaustive dissent he reviews, at page 540, et seq., the many authorities upholding this doctrine of abstention.

We are in thorough accord with the opinion of the Court of the Fifth Circuit in the case of Empire Pictures Distributing Company, Inc., et al. v. City of Fort Worth, et al., 273 Fed. (2) 529, in which the Court upheld the doctrine of abstention and quotes at length from many of the applicable authorities to that doctrine, and particularly applicable to the issues raised in the case here. In that case the Court said: "At the threshold of the case lies the question whether the trial court ought not sua sponte to have withheld action 'while the parties repaired to a state tribunal for an authoritative declaration of applicable state law'." The Court then, in a very able opinion, and exhaustive, cited the many authorities, quoting from a number of them to the effect that the trial courts should have abstained. We shall not quote at length from that opinion more than to say that we adopt it as announcing the controlling principles of the law governing us in abstention in this case. In the earlier case of Railroad Comm'n of Texas, et al. v. Pullman Company, et al., 312 U. S. 496, the Supreme Court of the United States said:

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, Fenner v. Boykin, 271 U. S. 240, Spielman Motor Co. v. Dodge, 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, Pennsylvania v. Williams, 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, Gilchrist v. Interborough Co., 279 U. S. 159; cf. Hawks v. Hamill, 288 U. S. 52.61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. See Cavanaugh v. Looney, 248 U. S. 453, 457; Di Giovanni v. Camden Ins. Assn., 296 U. S. 64, 73. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

We think the above authorities and those cited below[2] along with those mentioned in the various opinions in the cases supra are ample to require that the federal court abstain.

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[2] *Martin* v. *Creasy*, 360 U. S. 219; *County of Allegheny* v. *Mashuda Co., et al.*, 360 U. S. 185; *Watson* v. *Buck*, 313 U. S. 387; *Callaway* v. *Benton*, 336 U. S. 142; *Government and Civic Employees Organization of C. I. O.* v. *Windsor*, 353 U. S. 664; *Two Guys from Harrison—Allentown* v. *McGinley*, 366 U. S. 589.

Moreover, the doctrine of abstention is peculiarly applicable in this case because of the attack made upon Sections 2087.5, 2087.7 and 2089.5 of the Mississippi Code of 1942, generally known as the peace statutes. All the authorities hereinbefore cited are applicable to these statutes, but there are other authorities which we think are just as applicable and for that reason we are treating these separately. As shown by the pleadings, the plaintiffs are contending that the defendants are using these statutes to enforce segregation and the defendants are contending that these statutes are constitutional and are not being used to enforce segregation, but are being used for the purpose of protecting the public against violence and disturbance of the peace. This Court, in the case of Wykcoff, had an occasion to pass upon a petition for habeas corpus growing out of the arrest of one of the "Freedom Riders" in the City of Jackson, wherein it was contended by the petitioner in that case that this statute was being used to enforce segregation. Her petition for the writ of habeas corpus alleged that she was convicted of violation of Section 2087.5 of the Mississippi Code and that she did not have any remedy at law other than the writ of habeas corpus to secure her release, and that her imprisonment was a denial of her due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States. The respondent, the Sheriff of Hinds County, in answering the petition for the writ, averred that she was convicted in a court having jurisdiction and that he was holding the petitioner by virtue of a commitment from that court. The matter was heard before the Court of the Southern District of Mississippi and the writ denied. She immediately petitioned the Court of Appeals for the Fifth Circuit for an appeal in forma pauperis,

that the petition be granted and the case advanced. The Court of Appeals denied the petition and since the opinion has not been published, a copy of the opinion rendered by the Court is attached hereto in Appendix III.

In the trial before the lower court it was contended by petitioner that she had no adequate remedy at law, which contention was not upheld, as it was shown that under the statutes of Mississippi particularly she did have a full, adequate and speedy remedy at law and these statutes are set out in the opinion of the District Court. 196 F. Supp. 515. In that case the Court did retain jurisdiction, but since the petitioner did have adequate remedy at law, the writ was denied. In that opinion the Court said: "As heretofore stated, the federal courts are very reluctant indeed to interfere with the orderly process of a state court involving state matters." And cited the cases of Davis v. Burke, 179 U. S. 399; Parte Hawk, 321 U. S. 114; Stock v. Boyle, 342 U. S. 1; Brown v. Allen, 344 U. S. 443.

It is true that upon an application for a writ of habeas corpus there is a federal statute which prohibits the federal courts from interfering with the state courts, except in those cases specifically authorized by Congress. However, the principle involved is the same, since it is the general doctrine that the federal courts should not lend their equitable powers and injunctive powers until the state courts first have passed upon the constitutionality of its own acts. Section 2283, Title 28, U. S. C. A. prohibits a court of the United States from granting an injunction to stay proceedings in a state court except as expressly authorized by the Act of Congress, or when necessary in aid of its jurisdiction, or to protect and effectuate its judgments. In view of that statute the writ of habeas corpus was denied in the Wykcoff case, and citing in support

thereof: Empire Pictures Distributing Co. v. City of Fort Worth, 273 Fed. 2d 529; Douglas v. City of Jeannette, 319 U. S. 157.

At pages 163-164 of the City of Jeannette case, supra, the Supreme Court of the United States said:

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. * * *
>
> "* * * No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be

supported only on a showing of danger of irreparable injury 'both great and immediate'. • • •

"• • • It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court."

The principles announced in the Jeannette case have been reaffirmed on the basis of that case and the Stefanelli case, 342 U. S. 117, 123-124, in two Supreme Court cases decided this year: Wilson v. Schnettler, et al., 365 U. S. 381, and Tugach v. Dollinger, 365 U. S. 458. These cases are discussed more at length in the Wyckoff case, 196 F. Supp. 522-523.

The whole question of State-Federal relationships and their history is discussed in a recent decision of the Court of Appeals for the Fifth Circuit in Smith & Son, Inc. v. Williams, 275 F. 2d 396. Beginning on page 402 will be found a large number of cases applicable to the questions before us.

Statutes generally known as peace statutes exist in most of the States of the Union and have been applied under a variety of circumstances in recent times. They have been used by the officers of the States and subdivisions thereof to prevent violence and more serious offenses where people have gathered, or are threatening to gather in numbers under pressure of emotional stress. The public press carried an account recently of a congregation of a large number of white people when Negroes sought to make use of

bathing beaches at or near Chicago. It was stated that the state officers made use of loud speakers to order the crowd to leave the scene or be subject to imprisonment under state laws. It was not hinted that those who had collected did not have the full right to be where they were. Acting under state peace statutes, the officers simply required them to move on, because in their judgment their presence was likely to lead to a breach of the peace. The scope and reach of such statutes varies from state to state, and their application to a given situation makes a peculiar call on the judgment of state tribunals before such application should be tested in a court of the United States.

The situation disclosed by the facts in this record fall, in our opinion, directly within the scope of the decisions of the Supreme Court requiring abstention until the State courts have decided the full meaning of their respective statutes and their application to the situations which are presented to us.

The record before us shows the pendency of a number of proceedings before the State Courts of Mississippi under the peace statutes, and the class for which the plaintiffs here purport to act is already participating in state court proceedings where all of the questions raised before us may be fully presented with the right of appeal to the Supreme Court of the United States.

An order will be entered, therefore, abstaining from further action in this cause to give the State Courts of Mississippi a reasonable opportunity to act either in the cases already pending or in any new case which any of the parties may elect to commence.

APPENDIX I

Statutes Involved

MISSISSIPPI CODE OF 1942

§ 2087.5—

"1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

"(1) crowd or congregates with others in or upon shore protecting structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individua,l or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, or

"(2) insults or makes rude or obscene remarks or gestures, or used profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

"(3) while in or on any public bus, taxicab, or other vehicle engaged in transporting members of the pub-

lic for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in subsection (2) supra, to, toward, or in the presence or any other passenger on said vehicles or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

"(4) refusing to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof,

"shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment; and if any person shall be guilty of disorderly conduct as defined herein and such conduct shall lead to a breach of the peace or incite a riot in any of the places herein named, and as a result of said breach of the peace or riot another person or persons shall be maimed, killed or injured, then the person guilty of such disorderly conduct as defined herein shall be guilty of a felony, and upon conviction such person shall be imprisoned in the Penitentiary not longer than ten (10) years.

"2. The provisions of this act are supplementary to the provisions of any other statute of this state.

"3. If any paragraph, sentence, or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or pro-

vision of this act, but such other part shall remain in full force and effect." Source: Laws of 1960.

§ 2087.7—

"1. It shall be unlawful for any person or persons, while in or on the premises of another, whether that of an individual person, or a corporation, or a partnership, or an association, and on which property any store, restaurant, sandwich shop, hotel, motel, lunch counter, bowling alley, moving picture theatre or drive-in theatre, barber shop or beauty shop, or any other lawful business is operated which engaged in selling articles of merchandise or services or accommodation to members of the public, or engages generally in business transactions with members of the public, to:

"(1) prevent or seek to prevent, or interfere with, the owner or operator of such place of business, or his agents or employees, serving or selling food and drink, or either, or rendering service or accommodation, or selling to or showing merchandise to, or otherwise pursuing his lawful occupation or business with, customers or prospective customers, or other members of the public who may then be in such building, or

"(2) prevent or seek to prevent, or interfere with, or seek to interfere with, other persons, expressly or impliedly invited upon said premises, or prospective customers, coming into or frequenting such premises in the normal course of the operation of the business conducted and carried on upon said premises,

"shall be guilty of disorderly conduct, a misdemeanor, and upon conviction thereof, shall be punished by a

fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

"2. The provisions of this act are supplementary to the provisions of any other statute of this state.

"3. If any paragraph, sentence, or clause of this act shall be held to be unconstitutional, or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect." Source: Laws of 1960.

§ 2089.5—

"1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

"2. The provisions of this act are supplementary to the provisions of any other statute of this state.

"3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect." Source: Laws of 1960.

APPENDIX II

Statutes Involved

MISSISSIPPI CODE OF 1942

§ 2351—

"If any person or corporation operating a railroad shall fail to provide two or more passenger cars for each passenger train, or to divide the passenger cars by a partition, to secure separate accommodations for the white and colored races, as provided by law, or if any railroad passenger conductor shall fail to assign each passenger to the car or compartment of the car used for the race to which the passenger belongs, he or it shall be guilty of a misdemeanor, and, on conviction shall be fined not less than twenty dollars nor more than five hundred dollars." Source: Code of 1892.

§ 2351.5—

"Every railroad company, bus company or other common carrier for hire owning, maintaining or operating a passenger depot, bus station or terminal where a waiting room for passengers is maintained and operated shall cause to be constructed and maintained in connection with such reception or waiting room two closets or retiring or rest rooms to be exclusively used by white passengers in intrastate commerce arriving and departing from such depot, bus station or terminal and the following notice shall be painted or shown in bold letters on the door of one: "Rest Room, white female only in intrastate travel", and on the other: "Rest Room, white male only in intrastate travel";

and likewise two closets or retiring or rest rooms shall be constructed and maintained for colored passengers in intrastate travel with like signs painted or shown in bold letters on the doors thereof, substituting the word "colored" for "white", and such owner or operator shall see that the closets or rest rooms are equally clean and in equally good sanitary condition.

"No white person shall enter, frequent, occupy or use the colored closets or rest rooms required by this act, and no colored person shall enter, frequent or occupy or use the white closets or rest rooms required by this act, except, however, regularly employed persons of the owner or operator of the passenger depots, bus stations or terminals may enter such closets or rest rooms in the discharge of their assigned duties.

"Any person violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) or confined in jail for not more than one year, or both." Source: Laws of 1956.

§ 2351.7—

"1. Any person traveling in intrastate travel by rail, bus, airline or other common carrier for hire who knowingly or wilfully enters or attempts to enter the waiting room not marked and provided for persons other than his or her race as required by law, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) and imprisoned in jail not more than sixty (60) days, or both such fine and imprisonment.

"2. No white person shall enter, frequent, occupy or use the colored waiting room of any depot, bus station or terminal when such waiting room is marked in bold letters as required by law; and no colored person shall enter, frequent, occupy or use the white waiting room of any depot, bus station or terminal when same is marked in bold letters as required by law, except, however, regularly employed persons of the owner or operator of depots, bus stations or terminals may enter same in the discharge of their assigned and required duties.

"Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) and imprisoned in jail for not more than one year, or both.

"3. No action or suit in low or in equity may be brought in any court of this state against any law enforcement officer for damages for false arrest of any passenger because of a violation of this act, nor shall any common carrier of passengers, or its employees be subject to suit for damages on account of such common carrier of passengers or its employees complying with the provisions of this act.

"4. In the event any part or parts of this act shall be held unconstitutional, the remaining portion of this act shall remain in full force and effect." Source: Laws of 1956.

§ 7784—

"Every railroad carrying passengers in this state shall provide equal but separate accommodations for

the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition to secure separate accommodations; and the conductor of such passenger train shall have power, and is required, to assign each passenger to the car, or the compartment of a car, used for the race to which such passenger belongs; and should any passenger refuse to occupy the car to which he or she is assigned by the conductor, the conductor shall have power to refuse to carry such passenger on the train, and for such refusal neither he nor the railroad company shall be liable for damages in any court." Source: Code of 1892.

§ 7785—

"All persons or corporations operating street railways and street or municipal buses, carrying passengers in this state, and every common carrier by motor vehicle of passengers in this state as defined by section 3 (e) of chapter 142 of the laws of 1938 (§ 7634, Code of 1942), shall provide equal, but separate, accommodations for the white and colored races.

"Every common carrier by motor vehicle of passengers in this state, as defined by section 3 (e) of chapter 142 of the laws of 1938 (§ 7634, Code of 1942), by buses or street cars operated entirely within the corporate limits of a municipality, or within a radius of 5 miles thereof, shall divide its passengers by the use of an appropriate sign 4 x 9 inches, for the purpose of, and in a a manner that will "suitably provide for, a separation of the races, and all other buses and motor vehicles carrying passengers for hire in the

state of Mississippi shall use a latticed movable partition extending from the top of the seat to the ceiling of the vehicle, said partition not to obstruct the view of the driver of the vehicle to secure such separate accommodations; provided, however, that this act shall not apply to buses operated exclusively for the carrying of military personnel; and the operators of such passenger buses shall have power, and are required, to assign each passenger to the compartment of the bus used for the race to which such passenger belongs; and in no case shall any passenger be permitted to stand in the aisle of the compartment in which he does not belong and is not so assigned; and should any passenger refuse to occupy the compartment to which he or she belongs and is assigned, the operator shall have the power to refuse to carry such passenger on the bus; or should either compartment become so loaded in transit as not to permit the taking on of any further passengers for that compartment, then the bus operator shall not be required and shall refuse to take on any further passengers in violation of this act. Even though such additional passengers may have purchased and may hold tickets for transportation on the said bus, the only remedy said passengers shall have for failure or refusal to carry them under such circumstances is the right to a refund of the cost of his ticket, and for said refusal in either case neither the operator nor the common carrier shall be liable for damages in any court. Such partition may be made movable so as to allow adjustment of the space in the bus to suit the requirements of traffic." Source: Code of 1956.

§ 7786—

"The operators of such street cars and street buses and motor vehicles, as defined by chapter 142 of the laws of 1938 (§§ 7632-7687, Code of 1942) shall have power and are required to assign each passenger to the space or compartment used for the race to which such passenger belongs.

"Any passenger undertaking or attempting to go into the space or compartment to which by race he or she does not belong shall be guilty of a misdemeanor, and upon conviction, shall be liable to a fine of twenty-five dollars ($25.00), or, in lieu thereof, by imprisonment for a period of not more than thirty (30) days in the county jail; and any operator of any street car or street bus or motor vehicle as herein defined, assigning or placing a passenger to the space or compartment other than the said one set aside for the race to which said passenger belongs shall be guilty of a misdemeanor and, upon conviction, shall be liable to a fine of twenty-five dollars ($25.00), or, in lieu thereof, to imprisonment for a period of not more than thirty (30) days in the county jail." Source: Code of 1906.

§ 7786.01–

"Every person or corporation operating street railways and street or municipal buses, carrying passengers in this state, and every common carrier of passengers in this state by motor vehicle, as defined by section 3 (e) of chapter 142 of the laws of 1938 (§ 7634, Code of 1942), guilty of wilful and continued failure to observe or comply with the provisions of this act shall be liable to a fine of twenty-five dollars

($25.00) for each offense, and each day's violation of the provision hereof shall constitute a separate violation of this act; provided, however, that in the case of persons or corporations operating street railways and street or municipal buses, the fine shall be ten dollars ($10.00) instead of twenty-five dollars ($25.00)." Source: Laws of 1944.

§ 7787—

"All officers and directors of street railway companies who shall refuse or neglect to comply with the provisions and requirements of the two preceding sections shall be deemed guilty of a misdemeanor, on conviction shall be fined not less than one hundred dollars or be imprisoned in the county jail not less than sixty, and not more than six months, and any conductor or other employee of such street car company having charge of the same, who shall refuse or neglect to carry out the provisions of this chapter shall, on conviction, be fined not less than twenty-five dollars or be imprisoned in the county jail for not less than ten days nor more than thirty days for each and every offense; provided, that nothing herein contained shall be construed as applying to nurses attending children of the other race." Source: Code of 1906.

§ 7787.5—

"1. In all passenger depots, bus stations or terminals owned, operated or leased in the State of Mississippi by a railroad company, bus company or any other common carrier of passengers, the owner or operator thereof shall cause to be constructed and

maintained waiting or reception rooms as will secure the comfort of the passengers.

"In such depots, bus stations or terminals there shall be constructed, provided and maintained for the white intrastate passengers a separate waiting or reception room, on each entrance to which shall be painted or shown in bold letters the following:—"White waiting room, intrastate passengers"; and in such depot, bus station or terminal there shall be constructed, provided and maintained a separate waiting or reception room for the colored intrastate passengers, on each entrance to which shall be painted or shown in bold letters the following:—"Colored waiting room, intrastate passengers."

"2. Any common carrier of passengers for hire or any railroad or bus company, whether an individual or corporation, which fails or refuses to comply with the provisions of this act shall be liable in the penal sum of one thousand dollars ($1,000.00) per day for each day of such failure or refusal, to be recovered by by suit filed in the county in which such depot, bus station or terminal is situated, by either the attorney general, the district attorney of the district, or the county attorney of the county in which said passenger depot, bus station or terminal is situated.

"In addition to the penalty provided herein, the Attorney General of the State of Mississippi or the district attorney of the district, or county attorney in the county in which said depot, bus station or terminal is situated may file suit in the chancery court of such county for a mandatory injunction to compel compliance with the provisions of this act, and the chancery

court of any county wherein the provisions of this act are not complied with shall have jurisdiction to issue an injunction to require compliance with this act, and to hold in contempt of court any railroad company, bus company or any other common carrier of passengers failing to comply with the orders and decrees of the court directing compliance with this act.

"3. The requirements of this act shall not be applicable to any person, firm or corporation operating a place of business wherein said person, firm or corporation acts only as ticket agent for a bus company or other common carrier in addition to his regular business and wherein no passenger waiting room or reception room is maintained." Source: Laws of 1956.

APPENDIX III

Opinion of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

In the Matter of:

ELIZABETH PORTER WYCKOFF

For a Writ of Habeas Corpus

Before TUTTLE, *Chief Judge,* JONES and WISDOM, *Circuit Judges.*

BY THE COURT:

The petitioner herein seeks an order authorizing her to appeal from an order entered July 6, 1961, entered by the United States District Court for the Southern District of Mississippi, and moves for permission to proceed on her appeal upon the original papers filed in said District Court. Petitioner further moves for an immediate hearing of said appeal.

Petitioner asserts that she was arrested "for entering the white waiting room at the Continental Bus Terminal, Jackson, Mississippi, in the company of other interstate passengers of the Negro race, was sentenced on June 5, 1961, to two months imprisonment in the Hinds County Jail, suspended, and a fine of $200 for violating Section 2087.5, Mississippi Code of 1942, As amended."

Appendix III—Opinion of the United States Court of Appeals

Petitioner asserts that because of the short term of her detention, and "the clear violation by respondent of the constitution and laws of the United States, the requirements that she must first exhaust her state remedies would, in effect, deny her the right of habeas corpus, in a situation where it was the sole effective remedy with which to safeguard her statutory and constitutional rights and liberties."

It nowhere appears in the petition that the petitioner has attempted to exhaust remedies available to her in the courts of the state of Mississippi, or that there is either an absence of available state remedies or that other circumstances exist which render such state remedies ineffective to protect the rights of the prisoner.

The jurisdiction of a federal court is fixed by the Acts of Congress. 28 U. S. C. A. §2254 provides as follows:

> §2254. State custody; remedies in State courts. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Dissenting Opinion

It not appearing from anything asserted in the petition in this case that petitioner sought to appeal her conviction, which she alleges to have been void and unconstitutional, or that she is financially unable to make bond pending such appeal, and it not appearing that petitioner has no right to test her detention by habeas corpus in the state courts of Mississippi, there appears to be no sound reason for this Court to grant petitioner's motion for expediting the hearing in this Court. There thus appears to be no sound reason for granting petitioner's motion for permission to appeal upon the original papers, since no allegations are contained in the petition asserting petitioner's financial inability to cause the record to be prepared in accordance with the rules of this Court.

The motions are, therefore, DENIED.

C. A. No. 3133—Samuel Bailey, et al. v. Joe T. Patterson, Attorney General of the State of Mississippi, Jackson, Miss., et al.

RIVES, *Circuit Judge*, dissenting:

The complaint seeks to enjoin state-imposed racial segregation in public travel facilities in the State of Mississippi and the City of Jackson, Mississippi. It seeks relief against two types of statutes and ordinances: (1) laws which on their face require the segregation of the races, and (2) laws which purport to deal with the maintenance of law and order but which, according to the complaint, are used to maintain segregation.

The plaintiffs are three adult Negro citizens residing in Jackson, Mississippi, who sue on behalf of themselves and

of other Negroes similarly situated and affected by the statutes and ordinances complained of.[1] The defendants are the Attorney General of Mississippi; the City of Jackson, its Mayor, Commissioners, and Chief of Police; Jackson Municipal Airport Authority; Continental Southern Lines, Inc.; Southern Greyhound Lines; Illinois Central Railroad, Inc.; Jackson City Lines, Inc.; and Cicero Carr d/b/a Cicero's Airport Restaurant.

The original complaint and motion for preliminary injunction were filed on June 9, 1961. A hearing on the plaintiff's motion for preliminary injunction was set for July 10, 1961. That hearing was continued because of the illness of an Assistant Attorney General of Mississippi. The hearing was reset for August 7, 1961.

Meanwhile, an Amended Complaint was filed on July 17, 1961. The hearing set for August 7, 1961 was confined to the argument of motions to dismiss, motions to dissolve the three-judge court, motions to abstain, motions for more definite statements, motions to require the plaintiffs to furnish security for costs, and to the plaintiffs' insistence upon a hearing of their motion for preliminary injunction. By order entered on that date, August 7, 1961, the court allowed the Amended Complaint which had been filed July 17, 1961; allowed the plaintiffs to join as an additional party defendant the Jackson Municipal Airport Authority; provided for service upon that party and for the filing of any motions and answers on its behalf; de-

[1] According to the complaint, "the class is composed of Negro citizens and residents of the State of Mississippi and other states who utilize the facilities and services of the defendant carriers located in the City of Jackson, and located in other cities of the State of Mississippi, and who travel in both intrastate and interstate commerce."

nied the motions to dismiss for lack of indispensable parties; denied, on conditions immediately met, the motions for more definite statements and the motions to require the plaintiffs to furnish security for costs; and carried with the case for later disposition the other motions to dismiss, the motions to dissolve the three-judge court, and the motions to abstain.

Over the plaintiffs' objection, their request to be heard on their motion for preliminary injunction was denied "in view of the broadening of the issues[2] by the Amended Complaint filed on July 17, 1961, and of the bringing in on this date of a new party defendant," and the hearing of the motion for preliminary injunction was passed until September 25, 1961. It was further ordered that on that date the court would hear the case, both on said motion and on the prayer for permanent relief. The court stated its intention finally to dispose of the case following the hearing set for September 25, 1961.

On September 25, 1961, over certain objections noted in the transcript of testimony, the court did proceed with the hearing of the case both on the motion for preliminary injunction and on the prayer for permanent relief. The taking of testimony consumed three days—Monday, Tuesday and Wednesday, September 25, 26, and 27. On Thursday, September 28, oral arguments of counsel were heard, and a further exhibit of the plaintiffs (No. 36) was received. The defendant Greyhound Corporation was permitted to

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[2] Paragraph 15 of the complaint was amended so as to make specific reference to the disorderly conduct and breach of the peace statutes, Secs. 2087.5, 2087.7 and 2089.5 of the Mississippi Code Annotated (1942), as among those under color of which the defendants pursued a policy, practice, custom and usage of segregating Negro and white passengers.

take the deposition of A. W. Wilson, which was filed on October 10, 1961. The testimony has now been transcribed and was filed on October 20, 1961, and additional briefs have been filed by the parties and by the amicus curiae, the United States of America.

The evidentiary disputes are not very material. The formal allegations of the complaint, the identity and residence of the plaintiffs, their use of the transportation facilities in question, the identification of the carrier defendants, their use of the busses, cars, terminals, depots, rest rooms, drinking fountains, etc., were all either admitted or established by undisputed evidence. Continental Southern and Greyhound admitted that in their Jackson terminals or depots there are signs on the outside doors of one waiting room which read: "COLORED WAITING ROOM—INTRASTATE PASSENGERS," and signs on the outside doors of another waiting room which read: "WHITE WAITING ROOM—INTRASTATE PASSENGERS," and on the sidewalks outside the respective waiting rooms are signs which read: "WAITING ROOM FOR COLORED ONLY—BY ORDER POLICE DEPT." and "WAITING ROOM FOR WHITE ONLY—BY ORDER POLICE DEPT." Each bus company claimed that it did not place the signs on the sidewalks, and that the signs on or over the doors were placed "pursuant to the provisions of Chapter 258, Laws of 1956, Regular Session of Mississippi Legislature." The bus companies further admitted that similar signs on or over the doors appear on waiting rooms in all terminals or depots in the State of Mississippi.

Illinois Central admitted that in its railroad terminal or depot in Jackson it maintains two separate waiting rooms, on the sidewalk outside of one of which are signs reading respectively: "WAITING ROOM FOR COLORED ONLY,

BY ORDER POLICE DEPT." and "WAITING ROOM FOR WHITE ONLY, BY ORDER POLICE DEPT.," and that similar signs are located in the railroad terminal at the bottom of the stairs leading from the trains.

The Chief of Police of Jackson in his testimony admitted that the signs on the sidewalk were placed by the Police Department pursuant to the City segregation ordinance.

Both the two Bus Companies and the Railroad denied enforcing segregation on busses or cars.

The Jackson City Lines admitted that, pursuant to State law, it maintains signs on its busses directing that Negroes and whites sit in separate parts, and that, when these directions are not observed and a "breach of the peace is imminent," it has a policy of stopping the bus and proceeding no further.

The Jackson Municipal Airport Authority admitted segregation of the rest rooms and drinking fountains in its waiting rooms. Cicero Carr, the lessee of the restaurant at the Airport, admitted that he would not serve Negroes in the main dining room, but would serve them on a back counter in a room partially used for storage.

The Mayor of the City of Jackson, the chief law enforcement official of the City, and the State Attorney General were questioned on their racial policy with respect to public transportation facilities. The majority ruled that such testimony was inadmissible, and I dissented.

The testimony was admitted under Rule 43 (c) of the Federal Rules of Civil Procedure as a specific offer of evidence. The statement of the Mayor is so pertinent it should be quoted at length. (The ordinance under discussion in his testimony is the City ordinance requiring the segregation of transportation facilities.)

Dissenting Opinion

"Q. . . . State your understanding of the racial policy of the City of Jackson with respect to transportation facilities in the City of Jackson. A. . . . It has been the policy of mine as chief law enforcement officer, and the members of the city council and the police department and of the people of Jackson, to maintain what has worked over the last hundred years to bring happiness and peace and prosperity to everyone within our city. That has been done by a separation of the races, not segregation. We never refer to it as segregation. Now, of course, you know and I know the State law upon which the City ordinance was patterned in 1956, with the preamble put in as ours, showing why—to maintain peace and order and to keep down disturbances. Since I have been Mayor I do not recall one incident where there has been an arrest under this ordinance or any segregation ordinance. We have at all times tried to maintain peace and keep down disturbances. That is the policy. Our policy calls for a great deal of give and take. It is agreeable to both the white and the colored. . . . So you see that laws can come and laws can go and laws can be changed, but the policy adopted here is to maintain happiness and contentment between the races, within the law, and at the same time giving the benefit of the great advantage over the years of living together in peace and quiet.

"Q. Does this ordinance accurately reflect this policy in effect, which you have just stated?

• • • • •

A. I think so . . . However, as Your Honors have read it, you read the last paragraph there, it says,

'The Council of the said City of Jackson owes the duty to its citizens, regardless of race, color, creed or station in life, to maintain good order and to prevent breaches of the peace, and thereby to promote the health and general welfare of all its citizens,' and then of course we adopted the State ordinance in this.

• • • • •

"Q. . . . Does the body of the ordinance, apart from the preamble, reflect the policy of the City of Jackson as you have stated it? A. The policy of the City of Jackson is certainly adopted in the ordinance which is based on State law, that is taken from State law and is based on exactly what I have said, the matter of separation of the races."

The State Attorney General testified on direct examination that it was his duty to enforce all of the laws in the State. He was extremely evasive on answering whether the State segregation laws affected his duty as Attorney General; however, he did say that they were laws of the State, that they had not been declared unconstitutional, and that he would enforce them "if conditions arise to such a point that I thought it was necessary to bring them into effect." He said in a concluding statement:

"My sole purpose since the beginning of these instigated troubles that were instigated outside our State and brought to our State, has been the preservation of peace and order within the borders of the State of Mississippi. I have undertaken that, along with all other public officials and law enforcement officers of this State."

Part of such undertakings were meetings prior to and just after the arrival of the first group of Freedom Riders on May 24, 1961, attended by himself, the Mayor and Chief of Police of Jackson. Plans were discussed at these meetings for dealing with the Freedom Riders. On this point he testified:

> "Q. Did you discuss with the Chief of Police what steps he was going to take to preserve law and order? A. Yes, we discussed plans.
>
> "Q. What were those plans? A. The plan was to do exactly what they did, first of all to keep down riot and disorder, and these arrests necessarily followed. They could have been easily avoided had your clients only wanted them avoided. . . ."

The Attorney General is not responsible for the enforcement of state law in the local courts; he is, nevertheless, the chief policymaker of state law enforcement.

The plaintiffs offered evidence of the arrests for breach of the peace of passengers on the defendant carriers. There is evidence of two incidents on the busses of the Jackson City Lines. (In fact, the records of the City Lines contain reports on only two incidents.) Plaintiff Bailey testified to the arrest of one Charles Patterson, a Negro, for refusing to move when a white man got on the bus and sat down next to him. Witness Doris Grayson testified to the arrest of herself and three companions who got on a City Lines bus in the center of the City and sat in a front seat. The bus was stopped for 10 minutes before a policeman came along. In neither instance is there any evidence in the record of an actual or threatened breach of the peace. The driver in the Grayson incident testified:

"Q. Were there any white persons on the bus? A. Yes.

"Q. At the time these four Negroes were on the bus? A. Yes.

"Q. Was there any disturbance on the bus? A. Not a bit.

"Q. Was there any disturbance outside the bus? A. No, not any."

The record also includes evidence on the arrests of approximately 300 Freedom Riders in the terminals of the defendant interstate carriers. Captain Ray of the Jackson Police Department, who personally made the majority, if not all, of the arrests, testified as follows with respect to the activities of the Negroes arrested in the white waiting room of the Illinois Central Railroad:

"Q. What were the Negroes doing that you arrested in there?

* * * * * *

A. They came in the terminal.

"Q. What did they do? A. They came in and some of them had seats and some of them stood.

"Q. What else did they do? A. That is about all.

"Q. Were they armed? A. I never found any of them armed.

"Q. Were they loud? A. No.

"Q. Did they use any curse words? A. No.

"Q. Did they strike anybody? A. No.

"Q. Did they threaten anybody? A. No.

"Q. Did you arrest them? A. I sure did.

"Q. For what? A. Because their presence provoked people and caused them to become disturbed, and I

felt it best to maintain law and order and to order them to leave there. When they refused to obey my order, they were arrested.

"Q. Would you explain what you mean by 'their presence there provoked people'? A. Well, as I stated earlier, we had advance notice that they were coming to Jackson to create an incident similar to what had happened in other cities, and my duty there was to maintain law and order, and I felt it best to get the root of the trouble out of there, and that is when I ordered them to leave.

"Q. What did they do in violation of law and order? A. When I ordered them to leave, they just stood there, as though they hadn't heard me say a word. I repeated that order several times, and they refused to obey, and that is when I arrested them."

He testified that all the other arrests in the waiting rooms of the remaining depots were virtually identical.

The testimony with respect to the circumstances surrounding the arrests is equally explicit. Chief of Police Rayfield was questioned on the existence of crowds of people around any of the terminals when a group of Riders arrived and were arrested. He testified that there were two such occasions, one on the first arrival at the Trailways terminal on May 24 when he was present, and another when the first group came to the Illinois Central terminal, of which he had a report. At the Trailways terminal, he testified that a number of people were waiting in cars and others congregated outside the terminal. To his knowledge none of them were fighting, loud or armed; their attitude, however, he termed hostile. The ones not in cars were

asked to disperse, and they did. At the Illinois Central terminal, Rayfield had reports that 10 or 15 people were milling about in the street exhibiting a hostile and disturbed attitude. They were asked to move, they complied and were gone by the time the Riders arrived. He then testified:

> "Q. Did you receive any other reports from your police officers of this nature? A. That's the only two.
>
> "Q. The only two reports you know about? A. The only two I received where there could have been any situation like you were just discussing. Now, the others I don't recall that there has been any other trouble around any of the terminals."

Captain Ray testified that the events within the terminal were roughly similar for all the arrests: Before the arrival of a group, people inside the terminal would make remarks, none of which particularly threatened violence. If necessary, he would order all those who did not have tickets or some business in the terminal to leave; they always complied. When the group arrived, some remarks were made, people in the terminal would follow them around, but no acts of violence ever took place. Captain Ray ventured the opinion that there might have been incidents of violence had he not arrested the Riders, but there is no indication that the situation could not have been handled by restraining or arresting the offending party.

This is the extent of the evidence in the record on potential breaches of the peace.

This action was brought by three Negro plaintiffs from the City of Jackson as a class action, on behalf of themselves and other Negroes similarly situated, under the

Civil Rights Act, 42 U. S. C. §1983, which creates an equitable cause of action against

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ."

The jurisdiction of the three-judge court is invoked pursuant to 28 U. S. C. §2281, §2284 because the constitutionality of state statutes has been attacked. The statutes attacked are the so-called segregation statutes of the State of Mississippi which require racial segregation in all common carriers and in waiting room and rest room facilities used by the carriers, and provide criminal penalties for carriers and persons refusing to abide by these laws.[3]

The defendants attacked the jurisdiction of the three-judge court on the ground that these statutes have never been enforced and no arrests have been made under their provisions. Under the recent case of *Poe* v. *Ullman*, 1961, 367 U. S. 497, the complete failure to enforce a state law, coupled with its open and notorious violation, prevents the federal courts from reaching the constitutionality of the statute since no case or controversy is presented. If such were the case here, the three-judge court would not have jurisdiction. The evidence shows, however, that the defendant carriers and the Jackson police maintain signs

[3] These statutes are: Title 11, Sections 2351, 2351.5, 2351.7, and Title 28, Sections 7784, 7785, 7786, 7786-01, 7787, 7787.5, Miss. Code Ann. (1942).

pursuant to the command of these statutes. This is sufficient evidence of enforcement to create a case or controversy and maintain the jurisdiction of the three-judge court.

In the alternative, the defendants argue that jurisdiction over the segregation statutes may not extend to the collateral problem of enforcement of segregation by means of the breach of the peace statutes on the grounds: (1) There is no authority under §2284, and (2) the court may not consider issues of fact. The concept of federal jurisdiction is by no means this narrow. In *Sterling* v. *Constantin*, 1932, 287 U. S. 378, the jurisdiction of the three-judge court, originally invoked to test a state statute limiting oil production, extended to the Governor of Oklahoma's attempt to institute the same production limitations by fiat under martial law. The three-judge court made extensive findings and concluded: "The evidence shows no insurrection nor riot, in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities." On this basis, the court held that the invocation of martial laws was invalid and that the military orders enforcing the production limitations were a denial of due process. The Supreme Court upheld the district court and specifically approved the extensive findings of fact:

> "Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts." (287 U. S. at p. 398.)

The Court went on to say that the jurisdiction of the three-judge court

"... extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decisions of such of the questions as in its opinion effectively dispose of the case." (287 U. S. at pp. 393-94.)

See also, *Hurn* v. *Oursler*, 1933, 289 U. S. 238; *Florida Lime Growers* v. *Jacobsen*, 1960, 362 U. S. 73; *Evers* v. *Dwyer*, 1958, 358 U. S. 202.

The City of Jackson, its Mayor, Commissioners and Chief of Police urge that the City cannot be sued in this action. They rely upon *Monroe* v. *Pape*, 1961, 365 U. S. 167, 191 n. 50, and *Egan* v. *City of Aurora*, 1961, 365 U. S. 514. The question is also relevant to relief against the Jackson Airport Authority.

The direct holding in *Monroe* v. *Pape* is that a municipal corporation is not a "person" within the meaning of section 1983 for the purpose of holding it liable for damages, and is based upon the finding that Congress rejected an amendment which would have made such corporations liable for money damages in specific cases. 365 U. S. at 188. The defendants argue that if the City is not a "person" for purposes of damages, it cannot be a "person" for purposes of an injunction, and further argue that the Supreme Court specifically so held in footnote 50 of *Monroe* v. *Pape*, supra at p. 191, when it said:

"In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U. S. C. §1983 were alleged. See, e.g., *Douglas* v. *City of Jeanette*, 319 U. S. 157; *Holmes* v. *City of Atlanta*, 350 U. S. 879. The question dealt with in our opinion was not

raised in those cases, either by the parties or by the Court. Since we hold a municipal corporation is not a 'person' within the meaning of §1983, no inference to the contrary can any longer be drawn from those cases."

The question of whether a municipality could be sued under §1983, for *equitable* relief, however, was not before the Court, and I do not believe that the Court intended in a footnote to overrule prior cases indicating that a municipal corporation could be so sued. See *Douglas* v. *Jeanette*, supra; *Holmes* v. *City of Atlanta*, supra; *Mayor and City Council of Baltimore City* v. *Dawson*, 350 U. S. 877, affirming 220 F. 2d 386 (4 Cir., 1955). This is especially true when the legislative history upon which the Court relies is directed solely to the question of damages. We are not here concerned with the question of tortious action and the liability of the City Taxpayers for such actions over which they had little possible control. The question here is one of prospective equitable relief for the protection of the plaintiffs' constitutional rights against not just the tortious activity of individuals, but the enforcement of City ordinances, officially declaring City policy, and officially recorded on the City Journal. This same issue has been before the Seventh Circuit Court of Appeals since *Monroe* v. *Pape*, and that Court held:

"None of the reasons which support a city's immunity from an action for damages for tortious injuries already inflicted by its officers, agents or servants applies to this case. No reason is apparent why a city and its officials should not be restrained from prospectively violating plaintiffs' constitutional rights

pursuant to its own legislative enactment, and an injunction not be granted as provided in §1983."

Adams v. *City of Park Ridge*, 7 Cir., 1961, 293 F. 2d 585, 587. For these reasons, I believe that footnote 50 in *Monroe* v. *Pape* may be construed to say that, whether or not a municipal corporation is subject to *equitable* relief under §1983, no inference from cases indicating that it may is relevant to the issue of its liability for damages.

More fundamentally, however, the plaintiffs' right of action against the City does not depend alone upon §1983. The rights asserted here are based on the Constitution which itself creates the cause of action for equitable relief and, within the meaning of 28 U. S. C. §1343(3) (the jurisdictional provision upon which this suit is based), authorizes this suit. *Cf. Bell* v. *Hood*, 1946, 327 U. S. 678; *Brewer* v. *Hoxie School District No. 46*, 8 Cir., 1956, 238 F. 2d 91, 103; *Hart & Wechsler, The Federal Courts And The Federal System* 794097 (1953). Doctrines of immunity can have no application to suits in equity brought to restrain invasions of federal constitutional rights. *Sterling* v. *Constantin*, 1932, 287 U. S. 378, 393; *Ex parte Young*, 1908, 209 U. S. 155, 156; *Graves* v. *Texas Company*, 1936, 298 U. S. 393, 403-04; *Georgia RR* v. *Redwine*, 1952, 342 U. S. 299, 305 n. 17.

I would hold that the City of Jackson and the Jackson Airport Authority are proper parties.

All motions attacking this court's jurisdiction should be overruled.

Nor should this court abstain from considering the merits. The court may not rely on *Harrison* v. *N.A.A.C.P.*, 1959, 360 U. S. 167, which approves abstention where the

state law attacked might be construed by the state courts to avoid the constitutional question, *since the segregation statutes are incapable of a valid construction.* No authority whatsoever may be found for the proposition that, where a state statute is clearly and unavoidably unconstitutional on its face, comity requires that state courts be allowed the privilege of so declaring. Such a rule would be, not abstention, but abdication of our judicial function. Nor may this court rely on *Douglas* v. *Jeanette,* 1943, 319 U. S. 157, which held that federal courts, as a matter of comity and equitable discretion, should not interfere with state criminal proceedings and law enforcement officials when an adequate remedy is provided in the state proceedings for the protection and assertion of all constitutional rights. The primary requirement of *Douglas* v. *Jeanette* is that there be an adequate state remedy; that is not the case here. An exception to *Jeanette* has developed in favor of class actions on behalf of Negroes combating state supported segregation. As stated by the Court of Appeals in *Morrison* v. *Davies,* 5 Cir., 1958, 252 F. 2d 102, 103:

> "This is not such a case as required the withholding of federal court action for reason of comity, since for the protection of civil rights of the kind asserted Congress has created a separate and distinct federal cause of action. 42 U. S. C. A. §1983. Whatever may be the rule as to other threatened prosecutions, the Supreme Court in a case presenting an identical factual issue affirmed the judgment of the trial court in the Browder case [Browder v. Gayle, D. C. Ala., 142 F. Supp. 707, aff'd 352 U. S. 903] in which the same contention was advanced. To the extent that this is in-

consistent with Douglas v. City of Jeanette, Pa., 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, we must consider the earlier case modified."

Actually, this is not so much an exception as a practical application of the *Jeanette* requirement of "adequacy." For the alternative to this suit is that a great number of individual Negroes would have to raise and protect their constitutional rights through the myriad procedure of local police courts, county courts and state appellate courts, with little prospect of relief before they reach the United States Supreme Court. That Court already has a heavy docket without numerous such cases. Moreover, the proof of segregation may not be a straightforward proposition. As in the case here, the true nature of state policy and practice may become apparent only after proof of a pattern and practice over an extended period of time. Such a record can only be prepared in a single suit which finally settles the issue once and for all. The some 300 citizens arrested in Jackson since May cannot be expected to provide at their trials a record similar to the one in this case; and yet, without it, there may be no way for them to assert and protect their constitutional rights. All these factors go to the "adequacy" of the breach of the peace criminal proceedings and weigh against it. Equally important under the circumstances of this case is that, for some of the reasons above, Negro citizens in Mississippi will not even attempt to exercise their constitutional rights because their state remedies possibly "adequate in theory" are wholly inadequate in practice.

Another factor bearing on the adequacy of the state criminal proceedings is that the Freedom Riders arrested

in this case were travelers in interstate commerce. For such travelers to be delayed by arrest and trial, to be required to return for a de novo county court trial, and perhaps again for an appeal, is an unreasonable burden on interstate commerce when their only crime is the assertion of undisputed statutory and constitutional rights. This burden makes the state criminal proceedings wholly inadequate as an alternative to the present suit.

Any further doubts as to the validity of the distinction drawn in *Morrison* v. *Davis,* or the refutation of *Douglas* v. *Jeanette,* are put to rest by considering the bearing of the Fourteenth Amendment and 42 U. S. C. A. §1983 on the duty of this court. The Supreme Court had an opportunity to pass on the basic thrust and purpose of the Fourteenth Amendment soon after it was adopted. In the *Slaughter-House Cases,* 1872, 83 U. S. 36, 71-72, the Court said:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizens from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But

it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

"We do not say that no one else but the negro can share in this protection . . . But what we do say and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . . "

The last section of the Fourteenth Amendment provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Such legislation was already on the books when the *Slaughter-House Cases* were decided, and the very section under which the plaintiffs have brought this suit, 42 U. S. C. A. §1983, may be traced to section 1979 of the Revised Statutes and section 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. This section was recently before the Supreme Court in *Monroe* v. *Pape, supra,* where the Court discussed in detail its legislative history and purposes. As with the Fourteenth Amendment, this section was passed by Congress to secure the newly-won freedom of the Negro population in the South; it was intended to deal more specifically, however, with the securing of these rights in an atmosphere of violence caused by the unleashing of passions and prejudices which the mere assertion of these rights engendered in a portion of the white population. The Congressional solution was to create a remedy through the federal courts. The Court states:

"The debates are long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (365 U. S. at 180.)

Mr. Justice Frankfurter adds to this in his separate opinion what might be called the substantive right to the exercise of federal jurisdiction:

"... the theory that the Reconstruction Congress could not have meant §1979 principally as a 'jurisdictional' provision granting access to an original federal forum in lieu of the slower, more costly, more hazardous route of federal appeal from fact-finding state courts, forgets how important providing a federal trial court was among the several purposes of the Ku Klux Act ... Section 1979 does create a 'substantive' right to relief. But this does not negative the fact that a powerful impulse behind the creation of this 'substantive' right was the purpose that it be available in, and be shaped through, original federal tribunals." (365 U. S. at 251-52.)

Not only is it apparent that the purpose of these provisions is to protect the very kind of rights the plaintiffs assert, but the legislative history of section 1983 makes clear that the greater the danger of violence, the more important it is that the federal courts should accept and exercise

jurisdiction. Thus, the major portion of the defense of the City of Jackson and of the Attorney General of Mississippi, attempting to justify their actions because of the danger of violence, actually provides the most powerful argument for this court to exercise its jurisdiction and grant a federal remedy to protect the plaintiffs' rights.

The majority takes the position that the major issue in this case is the questionable use of the breach of the peace statutes, and that under the *Harrison* case we should abstain to allow the state courts to construe them. The plaintiffs' attack, however, is upon the segregation statutes, not the breach of the peace statutes, and they allege that the State is practicing the simplest of all evasions—it makes arrests under the breach of the peace statutes for violations of the segregation statutes. If there is substance to this allegation, it would be a fraud upon the jurisdiction of this court to abstain and give recognition to such an evasion. When the constitutionality of a state statute is attacked, we are under a duty to inquire into the law as it is actually applied. In *Poe* v. *Ullman, supra,* such an inquiry demonstrated that there was no case or controversy. In an earlier case, *Nashville, C. & St. L. Ry. Co.* v. *Browning,* 1940, 310 U. S. 362, such an inquiry uncovered a valid administrative amendment to a tax-assessing statute and the alleged discrimination was found to be a valid distinction.[4] In *Sterling* v. *Constantin, supra,* the

[4] "Here, according to petitioner's own claim, all the organs of the state are conforming to a practice systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it

inquiry uncovered the evasion of the Governor of Oklahoma. As a later Supreme Court case interpreted *Sterling* v. *Constantin*:

> "There martial law was employed in support of an order of the Texas Railroad Commission limiting production of oil in the East Texas field. The Governor was sought to be restrained as part of the main objective to enjoin 'the execution of an order made by an administrative . . . commission, and as such was indubitably within §266 [now §2284]."[5]

In this case, under the facts shown after a full trial and the law applicable to these facts, I am unable to find a bona fide breach of the peace issue. Rather, the facts clearly show that the arrests are a simple evasion to enforce segregation. This evasion provides no ground for abstention.[6]

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can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." Nashville, C. & St. L. Ry. Co. v. Browning, 1940, 310 U.S. 362, 369.

[5] Phillips v. United States, 1941, 312 U.S. 246, 253.

[6] See also Evers v. Dwyer, 1958, 358 U.S. 202, where the Court ordered a three-judge court, whose jurisdiction was invoked to enjoin Tennessee transportation statutes requiring segregation, to hear that and "any other method of state-enforced segregation on Memphis transportation facilities."

The Court has continually struck down state-enforced schemes of segregation, whether they were done directly or "ingeniously or ingenuously." Cooper v. Aaron, 1958, 358 U.S. 1, 17; Smith v. Texas, 1940, 311 U.S. 128, 132; Lane v. Wilson, 1939, 307 U.S. 268, 275; *see* Bush v. Orleans Parish School Board, E.D. La., 194 F.Supp. 182, aff'd sub nom. Gremillion v. United States, 30 L.W.

The statutes and ordinances which on their face require the segregation of the races in any transportation facility should be declared unconstitutional, null, and void, *Brown* v. *Board of Education*, 1954, 347 U. S. 483; *Browder* v. *Gayle*, M. D. Ala., 142 F. Supp. 707, aff'd 352 U. S. 903 (1954); *Baldwin* v. *Morgan*, 5 Cir., 1958, 251 F. 2d 780; *Boman* v. *Birmingham Transit Co.*, 5 Cir., 1960, 280 F. 2d 531.

It should be declared impermissible to use laws which purport to deal with the maintenance of law and order, or any other laws, to maintain segregation of the races in any transportation facility. To that end, it should be declared that no passenger or intended passenger is subject to arrest for disorderly conduct or breach of the peace unless the passenger is himself disorderly or does something more than to occupy some facility or place intended for use by persons of another race and to refuse to remove himself from such place or facility. To arrest a passenger under such circumstances is state-enforced segregation and therefore unconstitutional.

The defendants argue strongly on this last point that the State has merely been asserting its rights under the police power to maintain law and order. The evidence clearly shows, however, that none of the passengers arrested was ever himself disorderly. This poses the question of whether a passenger, whose only crime is the exercise of an undisputed constitutional right, may be arrested because this exercise provokes others to threaten or actu-

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3120 (Sup. Ct. 1961). It is not uncommon for the states to attempt to enforce segregation through general police power statutes. Boynton v. Virginia, 1960, 364 U.S. 454 (trespass); Boman v. Birmingham Transit Co., 5 Cir., 1960, 280 F.2d 531 (breach of the peace).

ally commit disorderly acts. That this is the substance of the defendants' position is clearly inferred from the facts to which they themselves testified—the signs on the sidewalk outside the waiting rooms pursuant to the segregation ordinance, the arrest of all those who attempted to "crack the laws" of Mississippi (to use the words of the State Attorney General), and the complete lack of disorderly conduct on the passenger's part at the time of arrest. This inference is made explicit, however, by the testimony of the Mayor, who states that, by definition, anyone who attempts to test the "separation of the races" creates a breach of the peace and provokes disorder.

This issue must be met head on for the evidence shows that on at least two occasions there was a danger of riots and disorder. Although past disorder does not concern us as far as a prospective injunction is concerned, there is a strong possibility that a similar situation would arise after an injunction did go into effect.

The issue is decided by again returning to the basis of this suit, the Fourteenth Amendment and section 1983. The Amendment was adopted and this section passed soon after the completion of the Civil War. A glance at the legislative history of section 1983, cited in *Monroe* v. *Pape, supra,* demonstrates that Congress had before it extensive evidence of the violence caused in the South by the newly-won Negro rights. Yet, nowhere, either in the Amendment or in section 1983, can there be found an intimation that either the danger or the existence of such violence is grounds for the revocation of constitutional rights granted primarily to Negroes. Rather, the answer of Congress was to provide federal jurisdiction and a federal remedy for their protection. From this it can only be concluded

that the provocation of violence in others is no defense to the denial of these plaintiffs' constitutional rights. If it were, the defendants and this court know that this case would spell the postponement of full enjoyment of constitutional rights by Negroes in the Deep South for many years to come. The Supreme Court faced and decided this issue in *Cooper* v. *Aaron*, 1958, 358 U. S. 1, 16, when it said:

> "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Buchanan* v. *Warley*, 245 U. S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

See also, *Sterling* v. *Constantin*, 1932, 287 U. S. 378; *Sellers* v. *Johnson*, 8 Cir., 1947, 163 F. 2d 877; *Rockwell* v. *Morris*, 1961, 211 N. Y. S. 2d 25.

A police officer would be justified in requiring a person to move from a transportation facility because of a sudden, unexpected, and extreme danger of bloodshed which could not be otherwise avoided. There is no evidence in this record, however, of such a situation having arisen. In the case of the incidents on the Jackson City Lines buses, there is

not even the intimation of potential disorder. Except for the two Freedom Rider arrivals where crowds gathered outside the transportation terminals, there is no evidence of an actual breach of the peace or a potential which a minimum of police officers could not have readily handled by arresting the individual actually creating the disorder. In the case where the crowd surrounded the Illinois Central, it was easily dispersed before the Riders even arrived, putting it in the same situation as all the others. On May 24, the day of the first Rider group, although the crowd was sizable, and their attitude hostile, they never created an actual disturbance or reached proportions beyond the ability of the police to handle, even had the Riders been allowed to remain in the terminal. It should, at this point, be noted that the Mayor of Jackson had been notified by the Attorney General of the United States before the Riders' arrival that, if, in the Mayor's opinion, the situation could not be handled by local authorities, he stood ready to send in Federal Marshals to aid the enforcement of order as had been done in Montgomery, Alabama. And I think it can be said with assurance that, if at any future time the law enforcement officials of Mississippi find that they cannot themselves handle the provocation of violence caused by the Negroes' exercise of their constitutional rights, the Attorney General of the United States would stand ready to send in Federal Marshals or any stronger force necessary to enforce order. There is no necessity to forego the exercise of rights guaranteed by the Constitution and laws of the United States in order to prevent violence on the part of persons opposed to the exercise of such rights. Any such surrender to mob rule would tremendously encourage mob spirit. We must continue to be ruled not

by the mob, but by the Constitution and laws of our Country.

It is my opinion that a permanent injunction should issue against the City of Jackson, its Mayor, Commissioners and Chief of Police, and the Jackson Municipal Airport Authority to restrain them from acting contrary to the foregoing declarations and to protect to the best of their ability the right of any passenger or intended passenger to exercise his constitutional rights on public transportation facilities.

This permanent injunction should extend to the State Attorney General. While he is not responsible for the enforcement of State laws through the local courts, and has prosecuted none of the arrests found in the record, he partook in meetings both before and after the arrival of the Freedom Riders on May 24, which determined the manner in which the situation would be, and thereafter was, handled. As the State official primarily charged with the duty to enforce State law, he must be held responsible for the plans made at these meetings and the way in which they have been carried out.

A permanent injunction should issue against Cicero Carr requiring him to serve without discrimination at the Airport Restaurant all members of the public who use and frequent the Jackson Municipal Airport and request service.

The carriers, Continental Southern Lines, Inc., Southern Greyhound Lines, Illinois Central Railroad, Inc., and Jackson City Lines, Inc., have stated that they are acting under apparent compulsion of City ordinance or State statute in any maintenance of segregation of the races in their transportation facilities of which they may be guilty; and,

that, promptly upon this court's declaration that such statutes and ordinances are unconstitutional, they will remove all signs indicating that any place or facility is intended for the use of persons of any particular race and will not further enforce or have any part in enforcing segregation of the races in any transportation facility. A simple declaratory judgment is therefore all that seems necessary as to said carrier defendants. This court should retain jurisdiction, however, so that further orders and judgments could be entered if it should thereafter be necessary or advisable.

In their prayer for relief, the plaintiffs ask that the enforcement of the segregation statutes and any other statutes used to enforce segregation be enjoined. They include in this prayer not only the restraining of future enforcement, but also the continued enforcement of these statutes against all of those arrested after the filing of this suit. According to the evidence, this includes some 190 persons. The power of the court to grant this request is supported fully by law. In *Ex parte Young*, 1908, 209 U. S. 123, the Supreme Court reaffirmed the principle that a court of equity could enjoin criminal proceedings commenced after the filing of a suit in federal court to enforce the same right. The Court stated:

> "It is further objected . . . that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in

> a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed . . . Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings."

209 U. S. at 161-162. See also, *In re Sawyer*, 1888, 124 U. S. 200, 211; *Truax* v. *Raich*, 1915, 239 U. S. 33, aff'g 219 Fed. 273 (D. Ariz., 1915). In terms of the anti-injunction statute, 28 U. S. C. §2283, it is a power "in aid of our jurisdiction" to prevent state courts from interfering with the determination of issues properly before the federal court. The propriety of granting such a request, however, is discretionary, and only the strongest equities will support such outright interference with state proceedings already commenced. I am of the opinion that such equities exist in this case.

The plaintiffs have had a motion for preliminary injunction pending since the filing of the original complaint on June 9, 1961. Although the plaintiffs filed an amended complaint on July 17 to make more explicit their attack upon the breach of peace arrests, the original complaint is broadly enough framed to include them. When a motion for preliminary injunction has been made, a three-judge court is directed by statute to give an expeditious hearing and decision. 23 U. S. C. §2284(4) provides, "the application shall be given precedence and assigned for hearing

at the earliest practicable day." 28 U. S. C. §1253 provides that the granting or denial of this motion may be appealed directly to the Supreme Court; the appeal lies as a matter of right. *R. C. A.* v. *United States*, N. D. Ill., 1950, 95 F. Supp. 660, aff'd, 341 U. S. 412 (1951). Thus, not only were the plaintiffs entitled to an early hearing and decision, but, in my opinion, they were entitled to a preliminary injunction. As Mr. Justice Brandeis wrote in *Union Tool Co.* v. *Wilson*, 1922, 259 U. S. 107, 112: "Legal discretion . . . does not extend to refusal to apply well-settled principles of law to a conceded state of facts." The essential facts in this case are undisputed, the law to be applied is clear, irreparable injury is established by evidence of a clear and continued deprivation of constitutional rights. The defendants' argument that such an injunction would have changed the status quo and therefore should not have been granted was before the Fourth Circuit Court of Appeals in a very similar case involving segregation of transportation facilities, and was decided adversely to the defendants. *Henry* v. *Greenville Airport Commission*, 4 Cir., 1960, 284 F. 2d 631. The defendants should not be allowed to rely upon their own continued unconstitutional behaviour for the purposes of defeating a motion for preliminary injunction. I would follow the ruling in the *Henry* case. See also *Clemons* v. *Board of Education*, 6 Cir., 1956, 228 F. 2d 855, 357; *Board of Supervisors* v. *Wilson*, 340 U. S. 909, affirming 92 F. Supp. 986 (E. D. La., 1950) (preliminary injunction granting admission to L. S. U.). Had such an injunction issued, arrests and prosecution of of those arrested would have been terminated, starting at the very latest with the date of the first hearing, July 10, 1961.

Dissenting Opinion

The continued refusal to rule on this motion, although it has been pending since the 9th of June, is in violation of this court's duty under the law, and the refusal should therefore be construed as a de facto denial. The reason for continuing the first hearing until August 8, 1961, due to the sickness of an Assistant Mississippi Attorney General, may have been warranted with respect to relief against his superior, but the City was present and, as subsequent events have shown, it was both willing and able to carry on a vigorous defense in its own behalf.

Thus, because of the undisputed facts, the clear violation of the plaintiffs' rights, and the unreasonable delay in ruling on the preliminary injunction, all prosecutions of passengers or intended passengers who were arrested for breach of the peace after the filing of the original complaint on June 9, 1961, but who, as the evidence in this case shows, were not themselves disorderly, should be enjoined.

Since this dissenting opinion was written, I have had the opportunity to read the memorandum opinion of Judge Frank M. Johnson, Jr., in *Lewis, et al.* v. *The Greyhound Corporation, et al.*, M. D. Ala., C. A. 1724-N, m/s, filed November 1, 1961, and find myself in agreement with nearly all of the views expressed by Judge Johnson in that opinion.

I respectfully dissent.

Order Dated November 17, 1961

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

Civil Action No. 3133

SAMUEL BAILEY, *et al.*,

—v.—

JOE T. PATTERSON, Attorney General
of the State of Mississippi, *et al.*

Pursuant to the opinion of the Court filed herein on November 17, 1961, it is now ordered by the Court that jurisdiction of this action is retained, but that all further proceedings herein be stayed for a reasonable length of time for the parties to repair to the State Court in which such issues may be now pending, or in any court of the state where any of the parties hereto may elect to institute an action for the adjudication of the issues.

ORDERED, this the 17th day of November, 1961.

SIDNEY C. MIZE
United States District Judge

CLAUDE F. CLAYTON
United States District Judge

Order Dated December 2, 1961

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

Civil Action No. 3133

SAMUEL BAILEY, *et al.*,

Plaintiffs,

—v.—

JOE T. PATTERSON, Attorney General of the State of Mississippi, *et al.*,

Defendants.

Plaintiffs have filed herein a motion for injunction together with accompanying affidavit pending appeal under Rule 62(c) F. R. C. P., and the defendant, Joe T. Patterson, has filed as a counter affidavit the affidavit of Jack Travis, one of the attorneys for the City of Jackson. This motion has been considered by each member of this Court, and Judges Mize and Clayton, constituting a majority of the Court, are of the opinion that the opinion and order of this Court filed herein on November 17, 1961, did not, as required under Rule 62(c), F. R. C. P., either grant, dissolve or deny the issuance of an injunction as required under Rule 62(c), F. R. C. P. Judges Mize and Clayton are of the opinion that all further proceedings in this cause, including this motion, should be stayed for a reasonable length of time to permit plaintiffs to proceed in a State Court as authorized by the order of November 17, 1961.

Order Dated December 2, 1961

It is therefore ORDERED, ADJUDGED and DECREED by the Court that pursuant to the opinion and order of this Court filed herein on November 17, 1961, that said action together with said motion for injunction pending appeal, be and the same are hereby retained on the docket of this Court, but that all further proceedings therein and thereon be stayed for a reasonable length of time to permit the parties to repair to the State Courts in which issues may now be pending, or to any court of the State of Mississippi which any of the parties hereto may elect to institute an action for the adjudication of the issues.

Judge Rives dissents from this holding and will express his views herein below.

This, 28th day of November, 1961.

SIDNEY C. MIZE
United States District Judge

CLAUDE F. CLAYTON
United States District Judge

(Handwritten)

I think that the judgment of November 17, 1961, is appealable. In my view it certainly has the effect of denying the plaintiffs' long pending motion for a preliminary injunction. While I dissented and would have granted both a preliminary and a final injunction, I am at this stage bound by the judgment of November 17, 1961, concurred in by the majority, and I now vote to deny an injunction pending appeal. I respectfully dissent from the action of the majority purportedly refusing either to grant or to deny an injunction pending appeal.

This 2nd day of December, 1961.

RICHARD T. RIVES
United States Circuit Judge

City Ordinance Requiring Carrier to Maintain Separate Facilities

AN ORDINANCE REQUIRING COMMON CARRIERS OF PERSONS TO MAINTAIN IN THE CITY OF JACKSON SEPARATE WAITING ROOM AND REST ROOM ACCOMMODATIONS AND FACILITIES FOR THE WHITE AND COLORED RACES; MAKING IT UNLAWFUL FOR ANY PERSON OF THE WHITE RACE TO USE SUCH ACCOMMODATIONS AND FACILITIES DESIGNATED AND SET APART FOR PERSONS OF THE COLORED RACES; MAKING IT UNLAWFUL FOR ANY PERSON OF THE COLORED RACES TO USE SUCH ACCOMMODATIONS AND FACILITIES DESIGNATED AND SET APART FOR PERSONS OF THE WHITE RACE; PRESCRIBING PENALTY FOR VIOLATION HEREOF; AND MAKING THIS ORDINANCE IMMEDIATELY EFFECTIVE.

WHEREAS, the citizens of the City of Jackson, Mississippi, have been accustomed for many generations to separation of the White race from the Colored races in the use of waiting room and rest room facilities and accommodations provided by common carriers of persons; and

WHEREAS, a sudden intermingling of the races necessarily involved in the common use of such waiting room and rest room accommodations and facilities would likely result in disturbances, breaches of the peace, disorder and confusion; and

WHEREAS, the Council of the said City of Jackson owes the duty to its citizens, regardless of race, color, creed or station in life, to maintain good order and to prevent breaches of the peace, and thereby to promote the health and general welfare of all its citizens, and it has power to adopt and enforce ordinances to accomplish such purposes;

City Ordinance Requiring Carriers to Maintain Separate Facilities

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF JACKSON, MISSISSIPPI:

SECTION 1. That all common carriers of persons which have heretofore provided and maintained separate waiting rooms, rest rooms and like accommodations and facilities be and they are hereby required to continue to maintain similar but separate waiting rooms, rest rooms and like accommodations and facilities for the White and for the Colored races, and to appropriately designate one of the said waiting rooms, rest rooms accommodations and facilities for use by persons of the White race only, and the other for use of persons of the Colored races only.

SECTION 2. That it shall be unlawful for any person of the White race to use as such the said accommodations so thus provided for use by persons of the Colored races only.

SECTION 3. That it shall be unlawful for any person of the Colored races to use as such the said accommodations so thus provided for use by persons of the White race only.

SECTION 4. That any person convicted of a violation of this ordinance shall be guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars ($25.00), nor more than one-hundred dollars ($100.00), or by imprisonment in the City Jail not to exceed thirty (30) days, or by both such fine and imprisonment.

SECTION 5. It having been found by the Council of the said City of Jackson, Mississippi, that in the preservation of good order and peace of the municipality, and in the promotion of the general welfare of its citizens, it is necessary for this ordinance to become immediately effective, and the same having been adopted by the unamimous vote

of all the members of the governing body of said city, it is further ordained that this ordinance shall be and become effective immediately.

APPROVED:

Allen C. Thompson, Mayor
C. W. Alexander, Commissioner
D. L. Luckey, Commissioner

ATTEST:

Mrs. J. R. Skinner
City Clerk

(SEAL)

I, Mrs. J. R. Skinner, the duly appointed, qualified and acting City Clerk and lawful custodian of the minutes of the Council and seal of said city, certify that the foregoing is a true and exact copy of an Ordinance passed by the City Council at its regular meeting on January 12, 1956, and recorded in Minute Book "FF", page 149.

WITNESS my signature and official seal of office, this 12th day of January, 1956.

(SEAL)

Mrs. J. R. Skinner,
City Clerk

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 643.

SAMUEL BAILEY ET AL.,
Appellants,

vs.

JOE T. PATTERSON ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION.

MOTION OF THE GREYHOUND CORPORATION AND CONTINENTAL SOUTHERN LINES, INC., TWO OF THE APPELLEES, TO DISMISS AND/OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

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Jackson, Mississippi,
Attorney for The Greyhound Corporation and Continental Southern Lines, Inc.

Of Counsel:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. .

SAMUEL BAILEY ET AL.,
Appellants,

vs.

JOE T. PATTERSON ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION.

MOTION OF THE GREYHOUND CORPORATION AND CONTINENTAL SOUTHERN LINES, INC., TWO OF THE APPELLEES, TO DISMISS AND/OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

The Greyhound Corporation and Continental Southern Lines, Inc., two of the appellees herein, respectfully move the Court to dismiss the appeal filed by appellants and/or affirm the judgment of the lower court as to these two appellees, and in support thereof say:

1. Appellants failed to introduce proof in the lower court as against these appellees which would justify the issuance of an injunction against these appellees on any theory or ground.

2. The questions raised in appellants' Jurisdictional Statement are unsubstantial insofar as these appellees are concerned and do not require further argument.

STATEMENT OF THE CASE.

A careful analysis of the pleadings in this suit will reveal there are three grounds or charges on which appellants rely for the issuance of an injunction or the granting of relief against these appellees. They are (1) segregation of passengers on buses based on race or color, (2) signs segregating passengers based on race or color at the terminal buildings of each of these appellees in the City of Jackson, Mississippi, and (3) the arrests of passengers in the two terminal buildings in the City of Jackson, Mississippi

ARGUMENT.

We shall first discuss the three grounds relied on by appellants in the lower court for the issuance of an injunction against these appellees.

For brevity sake, we shall refer to these two appellees as Greyhound and Continental.

(1) Segregation on Buses.

Appellants offered evidence of six different occasions involving the segregation of passengers on buses of The Greyhound Corporation and Continental Southern Lines.

Inc. These incidents went back as far as the year 1957. Two of the incidents involved Greyhound buses. Four of them involved Continental buses.

It shall not be our purpose to discuss the testimony applicable to each of these incidents. Suffice it to say, Greyhound and Continental overwhelmed appellants with their proof that no effort was made to segregate passengers based on race or color on five of the incidents mentioned. The bus drivers in each of these five incidents testified as to the occurrences. Apparently, the trial court did not feel or believe the evidence offered by appellants was sufficient to give consideration to the issuance of an injunction against either of these appellees because in neither the majority nor the dissenting opinions was the testimony of appellants relative to these incidents discussed. Evidently, the lower court, including Judge Rives who delivered a dissenting opinion, did not feel the testimony offered by appellants to support this ground or charge was sufficient to require comment relative to these five occurrences. This likewise is true with regard to the sixth incident.

The sixth incident had to do with the hostess on a Continental bus refusing to allow a passenger to occupy a seat for which she had a reserved-seat ticket. This incident occurred in the year 1959. The testimony on behalf of Continental shows that when complaint of this occurrence was made by the passenger, an investigation was conducted by Continental. It was found that the hostess on this particular bus refused to allow the passenger to occupy the seat called for by her ticket. This act on the part of the hostess was in violation of a rule or policy of the Company. On account of this incident, along with other reasons, this hostess was discharged from her employment with Continental.

The testimony is conclusive that neither of these two appellees gave any directions to any passengers as to what seats they should occupy on any bus. On the other hand, the testimony clearly shows that each of these two carriers has a rule which prohibits a bus operator from designating which seats shall be occupied by passengers. Witness after witness testified neither Greyhound nor Continental designated seats to be occupied by passengers based on the race or color of the passengers.

(2) Signs.

The testimony is without dispute, and Greyhound and Continental admitted, there were certain signs over the entrance doors of the terminals of the two carriers in the City of Jackson, Mississippi, which read "White Waiting Room—Intrastate Passengers" or "Colored Waiting Room—Intrastate Passengers."

The testimony is without dispute that the signs were placed over the entrance doors at the two terminal buildings pursuant to the provisions of Chapter 258, Laws of 1956, Mississippi Legislature, Regular Session. Violation of these statutes requiring the posting of these signs and the corresponding City of Jackson ordinance carries a severe penalty.

The evidence in this case is without dispute that neither Greyhound nor Continental makes any attempt to enforce obedience to these signs. There was testimony to the effect that members of the Negro race enter both waiting rooms in each terminal. Tickets have been sold to members of the Negro race in both waiting rooms in each terminal.

Both Greyhound and Continental stated to the lower court that if the statutes and ordinance requiring the post-

ing of these signs should be declared invalid then the signs would be removed by each of the carriers.

Attention is directed to the dissenting opinion of Judge Rives (Page 23) in which he in effect held there was no need for the issuance of an injunction against Continental and Greyhound on account of the posting of the signs over the entrance doors, but that the court should simply retain jurisdiction of the case so that further orders and judgments could be entered if it should thereafter become necessary or advisable.

As a matter of fact, this in reality is now a moot question because the signs mentioned above have been removed by both Continental and Greyhound at their terminal buildings in the City of Jackson. These signs were removed following the adoption by the Interstate Commerce Commission of Order in Docket No. MC-C-3358 dated September 22, 1961, effective November 1, 1961. These signs were removed in compliance with this order after the completion of the trial of this case in the lower court.

The evidence further shows there were certain signs placed on the sidewalks in front of the two terminal buildings by the Police Department of the City of Jackson which directed white intrastate passengers to a particular waiting room and Negro intrastate passengers to another waiting room. The testimony, however, is conclusive that neither Greyhound nor Continental had anything to do with the placing of these signs on the sidewalks or the maintaining of such signs. These two carriers do not own the sidewalks in front of the terminal buildings, and cannot control same. As a matter of fact, there was no real effort on the part of appellants to show these appellees had anything to do with the placing or maintaining of the signs on the sidewalks.

(3) Arrests.

The complaint in this case contains the allegation that Continental and Greyhound participated in the arrests of certain passengers in the two terminal buildings in the City of Jackson. We will not discuss the details of these arrests. Appellants made no effort in the offering of proof to show that either of these appellees had anything whatever to do with these arrests.

The proof on the part of these two appellees is conclusive and without dispute that neither appellee in any way participated in the arrests or had anything to do with them. Likewise is this true as to the criminal charges made against those who were arrested.

We respectfully submit that appellants were not entitled to an injunction or any relief against these appellees because they wholly failed to meet the burden of proof or to substantiate the allegations in the complaint against these appellees.

The proof, on the other hand, is overwhelming that Greyhound and Continental do not have any rule or policy requiring the segregation of its passengers based on race or color and, in fact, make no effort to segregate passengers based on race or color in any respect or in the use of any facilities of the carriers.

The rule is well established that the extraordinary character of injunctive remedy and the danger that its use in improper cases may result in serious loss to an innocent party require that the power to issue it shall not be lightly indulged in, but should be exercised sparingly and cautiously after thoughtful deliberation and with full conviction on the part of the court of its urgent necessity; that such relief should be granted only in clear cases

when necessary to prevent great and irreparable injury; and the court should be guided by the fact that the burden of proof rests upon the complaint to establish the material allegations entitling complainant to relief. *Erwin* v. *Dixion*, 9 How. 10, 13 L. Ed. 25; *Barker Painting Company* v. *Brotherhood, P., D. P. H.*, (C.A. 3 Pa.) 15 F.2d 16, Cert. Den. 273 U.S. 748, 71 L. Ed. 872, 47 S. Ct. 449; 28 *Am. Jur., Injunctions*, Paragraph 25, Page 515, and numerous authorities there cited.

Even if it were to be conceded that the majority opinion of the lower court was erroneous in applying the abstention doctrine, still this Court should not, insofar as these two appellees are concerned, reverse the judgment of the lower court because the right result was reached by that court. This is clear for the reason that appellants wholly failed to introduce testimony which entitled them to injunctive relief as against Greyhound or Continental.

We respectfully submit that a review of the Jurisdictional Statement filed herein by appellants is indicative of the fact that appellants realize the lower court should not have issued an injunction or granted any relief against these appellees because of the virtual total failure on the part of appellants to make any charges against these appellees therein.

We say without fear of successful contradiction that there is an absence of a substantial question herein as to these appellees. In fact, there is no question of any importance involved herein as to these appellees.

CONCLUSION.

We respectfully submit that insofar as Greyhound and Continental are concerned this appeal should be dismissed, or in the alternative, that the case should be affirmed.

Respectfully submitted,

JUNIOR O'MARA,
Post Office Box 1250,
Jackson, Mississippi,
Attorney for The Greyhound Corporation and Continental Southern Lines, Inc.

Of Counsel:

BUTLER, SNOW, O'MARA,
STEVENS & CANNADA,
Jackson, Mississippi.

CERTIFICATE OF SERVICE.

I, JUNIOR O'MARA, attorney of record for The Greyhound Corporation and Continental Southern Lines, Inc., two of the appellees herein, hereby certify I have this day served a true and correct copy of the above Motion and Brief upon counsel for all parties by depositing copies of same, addressed to each as indicated below, in the United States Mail, postage prepaid:

Honorable J. Will Young,
1309 Deposit Guaranty Bank Building,
Jackson, Mississippi.

Honorable Dugas Shands,
Assistant Attorney General,
New Capitol Building,
Jackson, Mississippi.

Honorable Rubel L. Phillips,
Deposit Guaranty Bank Building,
Jackson, Mississippi.

Honorable Thomas H. Watkins,
Plaza Building,
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No. 643

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1961

SAMUEL BAILEY, ET AL.,

v.

JOE T. PATTERSON, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

MOTION OF THE APPELLEE, JOE T. PATTERSON, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI TO DISMISS OR AFFIRM

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New Capitol, Jackson, Mississippi
Of Counsel for Appellee, Joe T. Patterson, Attorney General of the State of Mississippi

IN THE

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Now comes the Appellee, Joe T. Patterson, Attorney General of the State of Mississippi, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, and on the basis of this Motion and Brief filed contemporaneously herewith and in support hereof, moves that the appeal be dismissed and/or that the judgment of the District Court comprised of three

Judges in and for the Southern District of the State of Mississippi be affirmed on the grounds that the appeal is not within the jurisdiction of this Court; and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

It is therefore respectfully submitted that the appeal should be dismissed and/or that the judgment of the United States District Court in and for the Southern District of Mississippi should be affirmed.

DUGAS SHANDS, Assistant Attorney General
of the State of Mississippi
Counsel for Appellee, Joe T. Patterson,
Attorney General of the State of Mississippi

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

BRIEF IN SUPPORT OF MOTION OF THE APPELLEE, JOE T. PATTERSON, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, TO DISMISS OR AFFIRM

DUGAS SHANDS, Assistant Attorney General of the State of Mississippi
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I. THE APPEAL SHOULD BE DISMISSED BECAUSE THIS COURT LACKS APPELLATE JURISDICTION UNDER TITLE 28, U. S. C. A., SECTION 1253, OR UNDER ANY OTHER STATUTE.

The sole jurisdictional basis for the appeal by Appellants in this cause is Title 28, U. S. C. A., Section 1253, which provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

It is obvious from a reading of the opinion and order of the court below that said court neither granted nor denied Appellants' motion for interlocutory or perma-

nent injunction, but that, instead, the three-judge court merely remitted the cause to an appropriate state court but retained jurisdiction of this cause. It is difficult to perceive how such an order could constitute either a grant or a denial of a motion for preliminary or permanent injunction.

It is clear beyond doubt that the order entered below was not a "final" order or decree as provided by other Federal jurisdictional statutes.

That the order entered below does not meet the test of finality may be shown by a review of the controlling cases on this subject decided by this court.

A decree is final for the purposes of an appeal to the Federal Supreme Court when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. *Heike* vs. *United States*, 217 U. S. 423, 54 L. Ed. 821.

In order to be reviewable by the United States Supreme Court a judgment or decree must be not only final but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved. *Arnold* vs. *United States Use of Guimarin and Company*, 263 U. S. 427, 68 L. Ed. 371. *Collins* vs. *Miller*, 352, U. S. 364, 64 L. Ed. 616.

The jurisdiction of the United States Supreme Court cannot be invoked until after a final judgment below and until such a judgment has been rendered, the cause remains in the full judicial control of the court in which it is pending. *New York Elevated R. Co.* vs. *Fifth National Bank*, 118 U. S. 608, 30 L. Ed. 259.

In general, a judgment or decision, in either a criminal or civil case, is final for purposes of appeal only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. *Parr* vs. *United States*, 351 U. S. 513, 100 L. Ed. 1377.

A case may not be brought to the Federal Supreme Court by an appeal or writ of error in fragments but, to be appealable, the judgment must be not only final, but complete. *Collins* vs. *Miller*, supra, 252 U. S. 364, 64 L. Ed. 616. *Oneida Nav. Corp.* vs. *W. S. Job and Co.*, 252 U. S. 521, 64 L. Ed. 697.

Applying the principles enunciated in the above cited cases decided by this court, it seems clear that the order entered by the court below is not final.

Appellee contends that from the foregoing it is amply certain that this Court only hears appeals from final judgments and that the opinion and order of the Court below in this cause does not meet the test of "finality".

Appellee could use no better language in support of this contention than that employed by Mr. Justice Brennan in his dissenting opinion in the case of *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249, 268, 1 L. Ed. 2d 290, 304, as follows:

> "The polestar of federal appellate procedure has always been 'finality', meaning that appellate review of most interlocutory actions must await final determination of the cause at the trial level. 'Finality as a condition of review is a historic characteristic of federal appellate procedure. It was written into the First Judiciary Act and has been departed from only when observance of it would particularly

defeat the right to any review at all.' *Cobbledick* v. *U. S.*, 309 U. S. 323, 324, 325, 84 L. Ed. 783, 785, 60 S. Ct. 540."

In an attempt to sustain the jurisdiction of this Court in this cause Appellants in this Jurisdictional Statement (pages 3-5) cite the cases of *Bryan* vs. *Austin*, 354 U. S. 933, *NAACP* vs. *Bennett*, 360 U. S. 471, *Government and Civil Employees Org. Com., CIO* vs. *Windsor*, 347 U. S. 901, *Glen Oaks Utilities, Inc.* vs. the *City of Houston*, 280 F. 2d 330, and *Ettelson* vs. *Metropolitan Life Insurance Company*, 317 U. S. 188. It should be pointed out that the jurisdictional statute invoked in the *Glen Oaks Utilities* case, supra, was Title 28, U. S. C. A., Section 1292, and that said Section 1292 provides that the courts of appeals shall have jurisdiction of appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions". The language of Title 28, U. S. C. A., Section 1292, under construction in the *Glen Oaks Utilities* Case, Supra, is thus shown to be far more spacious and far reaching than that of the jurisdictional statute invoked here, and for that reason Appellee says that the *Glen Oaks Utilities* case should not be given weight by this court in deciding the question of its jurisdiction to hear this cause.

Ettelson vs. *Metropolitan Life Insurance Company*, supra, should be disregarded for the same reason.

The question of this court's appellate jurisdiction by virtue of the non-appealability of the abstention order entered by the court below in *Bryan* vs. *Austin*, supra, was not raised by the Appellees in that case in their motion to dismiss or affirm, and we think that that case should not be controlling authority because the question

of lack of jurisdiction was not raised. In passing, it is worthy of note that in the *Bryan* vs. *Austin* case, supra, this court vacated the abstention order entered by the court below only because the statute under attack in that case had been repealed by the South Carolina Legislature during the interval between the rendition of the opinion below and the appeal to this court.

It does not appear that the question of the appealability of the abstention order entered below was raised on appeal to this Court in the cases of *NAACP* v. *Bennett*, supra, 360 U. S. 471, or *Government and Civil Employees Org. Com., CIO* v. *Windsor*, supra, 347 U. S. 901.

II. THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED ON THE GROUNDS THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

A. The Court Below Correctly Applied the Doctrine of Equitable Abstention to This Case.

The doctrine of equitable abstention was first clearly enunciated by this Court in the case of *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 497, 85 L. Ed. 971. In our discussion of this doctrine, it might be well to review the language of Mr. Justice Frankfurter in rendering that opinion, so that more light might be shed on the reasons and principles underlying that decision.

This Court at 312 U. S. 499-501, 85 L. Ed. 974, 975, used the following enlightening language with regard to the question of abstention:

"But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the *Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn* v. *Field Packing Co.*, 290 U. S. 177, 78 L ed 252, 54 S Ct 138; *Lee* v. *Bickell*, 292 U. S. 415, 78 L ed 1337, 54 S Ct. 727. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication. • • •

"The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. • • •

"These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. • • •

"The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the State to enforce obedience to the order. *Beal* v. *Missouri P. R. Corp.* 312 U. S. 45, ante, 577, 61 S Ct 418, supra; Tex Civil Stat. Article 6476. In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands."

It is clear that the facts of the case at bar and the law applicable thereto falls within the above quoted language of this Court.

If a Federal Court were to hold the attacked statutes to be unconstitutional, it might well make an adjudication which would be soon displaced by a State court decision. It would also be acting contrary to the admonition that federal courts should avoid needless friction with state policies, and that federal courts should have "scrupulous regard for the rightful independence of the state governments".

It should also be pointed out that Appellants and other members of their purported class have adequate remedies under state law to vindicate whatever constitutional rights they may possess.

Appellee says that each and all of the statutes of the State of Mississippi and the ordinances of the City of

Jackson, Mississippi, under attack in this cause as being unconstitutional are susceptible of being given a construction by the Supreme Court of the State of Mississippi which would render them constitutional. Appellee further says that each and all of said statutes and ordinances are constitutional on their face.

If these statutes can be given an interpretation by the highest court of Mississippi that would render them constitutional, it is clear that the doctrine of abstention should be applied in this case.

Although Appellee contends that the statutes under attack in this cause are susceptible of being construed in such manner by the Mississippi Supreme Court so as to render them constitutional, and further asserts that said statutes and ordinances are constitutional on their face, it should be pointed out that none of these statutes or ordinances have come before the State Supreme Court for construction, and that, it is possible that if any or all of said statutes or ordinances should, in the future, come before that Court for interpretation, some or all of them might be held to be unconstitutional on the grounds of repugnance to the Constitution of the State of Mississippi.

This procedure is clearly the one called for by this Court in the *Pullman* case, supra, and the cases following it. Without doubt, the policy considerations underlying *Pullman* would be far better served by this procedure than the injudicious means urged upon this Court by Appellants. It is obvious that if the State courts are given the opportunity to pass on these statutes and ordinances as a condition precedent to the rendering of these statutes and ordinances unconstitutional by a Federal court that an unnecessary ruling of a Federal court on

a question of Federal constitutional law would be avoided and that the necessity for needless friction with State policies would be obviated. *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U. S. 639, 641, 3 L. Ed. 2d 562, 563-564.

This Court has applied the doctrine of equitable abstention in a line of cases down to the present, one of the outstanding cases being *Harrison v. N.A.A.C.P.* 360 U. S. 167, 3 L. Ed. 2d 1152. In that case the three-judge court below (159 F. Sup. 511, 515) found that the Virginia statutes under attack were passed by the Virginia Legislature "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A. L. R. 2d 1180 . . . as parts of the general plan of massive resistance of the integration of schools in the state under the Supreme Court decrees".

After setting out this finding of the court below, this Court in the *Harrison* case, supra, said at 360 U. S. 176, 3 L. Ed. 2d 1158:

> "According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question."

Even where this Court sustained the finding of a three-judge court that statutes under attack were enacted to frustrate the holding of this Court in the Brown case, this Court wisely saw fit to apply the abstention doctrine, A fortiori, this Court should reach the same result where no such finding was made by the court be-

low and where there was no proof to support such finding.

Appellants at page 26 of their Jurisdictional Statement attempt to distinguish the case at hand from the *Harrison* case, supra, by asserting that in *Harrison* both this Court and the trial court abstained only after being assured that the criminal laws there involved would not be enforced, and that plaintiffs would not suffer further injury pending clarification of the state law issues. In attempting to thus distinguish the instant case from *Harrison*, supra, Appellants overlook a very important difference between the two cases. In *Harrison*, supra, the threatened criminal prosecutions were under the Virginia statutes assailed as unconstitutional, while in this case the criminal prosecutions proceeding against certain persons on behalf of whom this Court, by order dated December 18, 1961, has expressed serious doubts as to the standing of these Appellants to represent in a "spurious class suit", are under statutes which Appellants at page 25 of their Jurisdictional Statement concede to be constitutional.

This Court is thus faced with the anomaly of these Appellants requesting it to restrain and enjoin the enforcement of criminal statutes which they pointedly concede are not challenged as unconstitutional.

At page 25 of their Jurisdictional Statement, under the section of their argument dealing with the doctrine of equitable abstention the Appellants use the following language:

> "In brief, appellants submit that since there is no claim of the invalidity of the disorderly conduct laws involved here, and no necessity for their construction, the principle of abstention is inapplicable.

> This case involves no 'preliminary guess' as to the meaning of the disorderly conduct laws, but rather, a claim that state officials are arresting people and prosecuting them to enforce segregation. Whether the disorderly conduct law does or does not authorize this conduct of the state officials is not decisive of the claim for relief from segregation enforced by the harassment program of appellees. This conduct is proscribed by the Constitution in either event."

The first two sentences from the above quotation appear to have been used to bolster the argument of Appellants that the doctrine of abstention is not applicable to this case. Then Appellants make the amazing statement that whether these statutes do or do not authorize the conduct of the state officials is not decisive of the claim for relief and that this conduct is proscribed by the Constitution in either event. In other words, Appellants are advancing the novel proposition that a state officer can be enjoined from acting under the authority, and not in excess of the authority, of a valid state statute.

As to the authority for such an assertion, Appellants' failure to cite any statute or case law in its support is far more eloquent than any comment that Appellee might make.

Appellants strongly rely on Judge Rives' language in his dissenting opinion below to the following effect:

> "... the segregation statutes are incapable of a valid construction. No authority whatsoever may be found for the proposition that, where a state statute is clearly and unavoidably unconstitutional on its face, comity requires that state courts be allowed the

privilege of so declaring. Such a rule would be, not abstention, but abdication of our judicial function."

Appellee respectfully disagrees with the language and the conclusions to be drawn therefrom quoted by Appellants from the opinion of Judge Rives. First, as stated above, Appellee says that the statutes attacked as unconstitutional are capable of a valid construction. Appellee further disagrees with the statement that no authority may be found for the proposition that, where a state statute is clearly unconstitutional on its face, comity requires that state courts be allowed the privilege of so declaring. As noted above, the policy considerations underlying the *Pullman* case, supra, dictate that state courts should first pass on state constitutional and statutory questions so as to avoid a needless decision on federal constitutional grounds.

Among the other cases in which this Court has applied the equitable abstention doctrine are: *Watson* v. *Buck*, 313 U. S. 387, 85 L. Ed. 417; *Chicago v. Fieldcrest Dairies*, 316 U. S. 168, 86 L. Ed. 1355; *Government and Civil Employees Org. Com., CIO* v. *Windsor*, 353 U. S. 364, 1 L. Ed. 2d 894; and *Louisiana Power & Light Co. v. Thibadaux*, 360 U. S. 25, 3 L. Ed. 2d 1058.

Appellants cite no cases in which the question of the applicability of doctrine of equitable abstention was raised and in which this doctrine was found to be inapplicable. In *NAACP* v. *Bennett*, supra, 360 U. S. 471, and the *Government & Civic Employees Org. of CIO v. Windsor*, 353 U. S. 364, I L. Ed. 2d 894 relied on by appellants to support the jurisdiction of this Court to entertain this appeal, upon remand to the three-judge court below, each of the three-Judge Courts in those cases

again abstained from ruling on the constitutionality of the state statutes involved and again remitted the matters to the state courts. The opinion of the three-Judge Court abstaining for the second time in the *Bennett* case, supra, is found at 178 F. Supp. 191, and the opinion of the three-judge court again abstaining in *Windsor*, supra, is found at 146 F. Supp. 214.

B. Federal Courts Do Not Have Jurisdiction To Restrain Or Enjoin a State Criminal Prosecution Under a State Statute Or Ordinance Not Alleged Or Shown To Be Facially Unconstitutional.

It should be noted at the outset that Appellants admit the validity and the constitutionality of the Mississippi "breach of the peace" statutes, being Sections 2087.5, 2087.7 and 2089.5 of the Mississippi Code Annotated of 1942. Appellants make this concession of constitutionality of these statutes at Page 25 of their Jurisdictional Statement.

Appellee says that this concession on the part of Appellants completely and totally disposes of the aspect of this appeal dealing with the enjoining of pending criminal prosecutions and future arrests under these "breach of the peace" statutes. It is a well-settled rule of law which has been enunciated in a long line of cases down to the present time that an action to enjoin the enforcement of, or prosecutions under, a state criminal statute not alleged or shown to be facially unconstitutional is a suit against a State, and cannot be maintained under the Eleventh Amendment of the United States Constitution.

In the case of *Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. Ed. 399, this Court dealt with this problem and first stated at 172 U. S. 164, 43 L. Ed. 404:

"In the present case it is not contended that the state statute, under which the County Court of Wythe County was proceeding, was repugnant to the Constitution or any law of the United States, or that the state did not have jurisdiction of the offense charged and of the person of the accused."

This Court then went on to state the following rule of law at 172 U. S. 169, 43 L. Ed. 406 as follows:

"No case can be found where an injunction against a state officer has been upheld where it was considered that such officer was proceeding under a valid state statute. In the present case the Commonwealth Attorney, in the prosecution of an indictment found under a law admittedly valid, represented the State of Virginia, the injunctions were therefore in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state."

In 1908 this Court decided the landmark case of *Ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714.

In that case this Court found that the Minnesota Rate Acts under attack were void as being in conflict with the "due process clause" of the Fourteenth Amendment.

In dealing with Young's contention that the injunction issued against him as Attorney General of the State of Minnesota was in essence an injunction against the State itself, the Court held that when a suit was brought against an officer of the State to enjoin him from enforcing an *unconstitutional* state law, that the suit was against the individual who held the State office, and not against the State.

At 209 U. S. 161, 162, 52 L. Ed. 730, this Court went on to say:

> "It is further objected (and the objection really forms part of the contention that the State cannot be sued) that a Court of Equity has no jurisdiction to enjoin criminal proceedings by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged *unconstitutional* statute, which is the subject-matter of inquiry in a suit already pending in a Federal Court, the latter Court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other Courts, until its duty is fully performed." (Emphasis Added)

The *Harkrader* and *Young* cases, supra, have been cited and followed by this Court in a long line of cases up to the present day. Among these cases are *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165, 54 L. Ed. 430; *Tyson & Brother* v. *Banton*, 273 U. S. 418, 71 L. Ed. 418; *Cline* v. *Frink Dairy*, 274 U. S. 445, 71 L. Ed 1146 and *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 82 L. Ed. 268.

C. Federal Courts Are Extremely Reluctant To Enjoin The Enforcement Of State Criminal Statutes Even Where It Is Found That Said Criminal Statutes Violate The Constitution Of The United States.

Even in instances in which State criminal statutes have been found to be facially unconstitutional, the Federal Courts are extremely reluctant to enjoin the enforcement of said statutes.

In the leading case of *Douglas* v. *The City of Jeannette*, 319 U. S. 157, 87 L. Ed. 1324, the Jehovah's Witnesses of Pennsylvania sought to enjoin arrests under a Pennsylvania criminal statute, which this Court had just declared unconstitutional (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292).

This Court in that case set out the necessary test warranting federal intervention using the following language (319 U. S. 157, 162-163, 87 L. Ed. 1324, 1329):

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. *Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given —should be withheld if sought on slight or inconsequential grounds.* * * * *It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions.* No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of

constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statutes or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, *are to be supported only on a showing of danger of irreparable injury 'both great and immediate'.*" (Emphasis Added)

This Court then assayed the record to see if the test were met. Here is the finding (319 U. S. 157, 164, 87 L. Ed. 1324, 1330):

"* * * It does appear from the record that petitioners have been threatened with any injury *other than that incidental to every criminal proceeding* brought lawfully and in good faith, or *that a federal court of equity* by withdrawing the determination of guilt from the state courts *could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.*" (Emphasis Added)

The rule announced by this Court in the *Douglas* case, supra, has been followed in many other cases, among which are: *Stefanelli* v. *Minard*, 342 U. S. 117, 96 L. Ed. 138; *Pugach* v. *Dollinger*, 365 U. S. 458, 5 L. Ed. 2d 678;

and *Wilson* v. *Schnettler*, 365 U. S. 381, 5 L. Ed. 2d 620.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 643

SAMUEL BAILEY, ET AL.,

Appellants,

vs.

JOE T. PATTERSON, ET AL.,

Appellees.

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM ON BEHALF OF THE CITY OF JACKSON, MISSISSIPPI, ITS MAYOR, COMMISSIONERS, AND CHIEF OF POLICE, APPELLEES.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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SAMUEL BAILEY, ET AL.,

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vs.

JOE T. PATTERSON, ET AL.,

Appellees.

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM ON BEHALF OF THE CITY OF JACKSON, MISSISSIPPI, ITS MAYOR, COMMISSIONERS, AND CHIEF OF POLICE, APPELLEES.

Now Come the City of Jackson, Mississippi, Allen C. Thompson, as Mayor, D. L. Lucky, as Commissioner, Thomas B. Marshall, as Commissioner, and W. D. Rayfield, as Chief of Police, Appellees in the above styled and numbered cause, by their attorneys, pursuant to Rule 16 of the Revised Rules of this Court, and respectfully move this Court to dismiss the appeal in this cause or in the alternative to affirm this cause, and as grounds therefor assign the following:

(1) This appeal should be dismissed as not within the jurisdiction of this Court because the order appealed from is not an appealable order under 28 U.S.C., Section 1253.

(2) This appeal should be dismissed as not within the jurisdiction of this Court because the United States District Court from which this appeal was taken did not have jurisdiction of this cause under 28 U.S.C., Section 2281.

(3) This appeal should be dismissed because the Appellants have no standing to litigate the constitutional issues presented because of the non-justiciability of Appellants' claims.

(4) In the alternative, the order appealed from should be affirmed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This appeal should be dismissed as not within the jurisdiction of this Court because the order appealed from is not an appealable order under 28 U.S.C., Section 1253.

The first page of Appellants' Jurisdictional Statement states that this appeal is from a judgment of the lower Court entered on November 17, 1961, "which denied Appellant's application for preliminary injunctions." We respectfully take issue with that statement. The order appealed from retained jurisdiction of the action but stayed further proceedings therein "for a reasonable length of time" for the parties to repair to the state Court in which the issues may now be pending or to institute an action in the state Court for the adjudication of said issues.

Counsel for Appellants take the position that any order which does not immediately grant an application for a preliminary injunction thereby denies same. We submit that an order staying the proceedings "for a reasonable length of time" is purely a procedural matter within the discretion of a three-judge Court sitting as a Court of equity,

We also submit that 28 U.S.C., Section 1253, which created an exception to the rule of finality required for an appeal to this Court should be strictly construed and should not be broadened by judicial interpretation. Counsel for Appellants are in effect asking this Court to amend 28 U.S.C., Section 1253, so as to permit an appeal from an order of a three-judge Court which does not immediately either grant or deny a motion for an interlocutory injunction.

If Congress had intended the staying of proceedings in a three-judge Court for a reasonable period of time as grounds for an appeal to this Court, it could have easily so provided. We believe that Congress knows the difference between an order staying the proceedings before the Court and an order granting or denying an injunction. 28 U.S.C., Section 2284(5), requires a three-judge Court to stay the proceedings before it under certain circumstances. We believe that if Congress had intended that an order staying proceedings for a reasonable length of time be appealable, it would have so stated.

We respectfully submit that orderly administration of justice would not best be served by permitting an appeal to this Court from every order of a three-judge Court staying proceedings therein for a reasonable period of time.

In *Enelow* v. *New York Life Insurance Company*, 293 U.S. 379, 79 L. Ed. 440, an action at law was filed to recover the proceeds of a policy of life insurance. The insurer interposed an equitable defense and petitioned the Court for a hearing on the equitable defense in advance of a trial by jury of the legal issues. The District Court sustained insurer's petition. This Court held that the action of the District Court, in denying the plaintiff a trial by a jury of the legal issues, in effect constituted

an injunction restraining the proceedings at law from which an appeal could be taken. In so holding, however, this Court was careful to state:

> "This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, *as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.*"*

In *City of Morgantown* v. *Royal Insurance Company*, 337 U.S. 254, 93 L. Ed. 1347, the insurer filed suit to reform an insurance policy. The defendant filed a counterclaim and a demand for a jury trial. The District Court granted a motion to strike the demand for a jury trial and set the case for trial to the Court without a jury. The defendant appealed, and the Court of Appeals dismissed the appeal, 169 F.2d 713. This Court affirmed, and, in an opinion delivered by Mr. Justice Murphy, stated:

> "The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from common-law practice which supported our conclusions in the Enelow and Ettelson Cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one."
>
> • • •

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*Note: All italics ours unless otherwise indicated.

"Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions."

* * *

"But piecemeal appeals have never been encouraged. The growth of the law of procedure in the United States during the last half-century has been steadily in the direction of simplicity and directness in the administration of justice. To that end, and with careful regard for the constitutional rights of the parties, this Court, pursuant to specific authorization by Congress, adopted the Rules of Civil Procedure, abolishing procedural distinctions between law and equity and establishing a single unified practice. We would ill serve the stated purposes of the Rules of Civil Procedure were we to perpetuate by analogy distinctions which the rules expressly disavow. The Court of Appeals was correct in dismissing the appeal and its judgment is affirmed."

Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176, 99 L. Ed. 233, involved the question whether, in an action for an accounting, an interlocutory order denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an injunction from which an appeal could be taken. In answering this question in the negative, this Court, speaking through Mr. Justice Reed, said:

"Congress has long expressed a policy against piecemeal appeals. The reasons for such a policy were stated as follows:

" 'From the very foundation of our judicial system the object and policy of the acts of Congress in rela-

tion to appeals and writs of error (with single exception of a provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887,) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.' McLish v. Roff, 141 US 661, 665, 666, 35 L ed 893, 894, 895, 12 S Ct 118.

"Section 22 of the Judiciary Act of 1789, 1 Stat. 73, 84, provided that appeals in civil actions could be taken to the circuit courts only from final decrees and judgments. That requirement of finality has remained a part of our law ever since, and now appears as Sec. 1291 of the Judicial Code.

"The trial court's interpretation of the quoted contract clause and its order denying a stay could not be called a final decision under Sec. 1291. It was as surely an interlocutory order as the District Court's order in Shanferoke Coal & Supply Corp v. Westchester Service Corp. 293 US 449, 451, 79 L ed 583, 586, 55 S Ct 313. The question here presented involves the interpretation of 28 USC Sec. 1292 (1) which makes an exception to the requirement of finality, permitting appeals from 'interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.' Appealability here turns on whether the District Court's refusal to stay this trial for arbitration was the refusal of an 'injunction' under Sec. 1292.

"The provision for interlocutory appeals was first introduced in 1891 when the circuit courts of appeals were established as intermediate appellate courts. 26 Stat 826. Section 7 of that Act allowed appeals from

interlocutory orders in equity 'granting or continuing' injunctions, but from those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of Sec. 1292 in its present form. No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history although the changes seme plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Cougress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicality of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. Shanferoke Coal & Supply Corp. v. Westchester Service Corp. 293 US 449, 451, 79 L ed 583, 586, 55 S Ct 313. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court.

"A series of decisions of this Court has developed the rationale for determining the appealability of such an interlocutory order as this under Sec. 1292, and its predecessors. The appealability of routine interlocutory injunctive orders raised few questions. See Georve v. Victor Talking Machine Co. 293 US 377, 79 L ed 439, 55 S Ct 229. There the statute was clear. It was when stay of proceedings, in distinction of injunctions, were appealed that the issue of jurisdiction became sharp."

• • •

"The Morgantown Case controls here. *Whether the District Court was right or wrong in its ruling that the contract provision did not require arbitration proceedings, it was simply a ruling in the only suit pending, actual or fictional. It was a mere order and not an injunction as that word is understood through the Enelow and the Ettelson Cases as a stay through equitable principles of a common-law action.*"

• • •

"It is difficult to generalize as to whether interlocutory appeals are or not advantageous to an efficient administration of justice. A compromise has been worked out by Congress through Sec. 1292. But that compromise does not authorize appeals to simplify litigation. *This ruling was a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction.*"

We submit that under the rule announced by this Court in the above cited cases, this appeal should be dismissed as premature. Counsel for Appellants cite *Bryan* v. *Austin*, 354 U.S. 933, 1 L. Ed. 2d 1527; *Government & Civic Employees' Organization Com.* v. *Windsor*, 116 F. Supp. 354,

affirmed 347 U.S. 901, 98 L. Ed. 1061; and *N.A.A.C.P.* v. *Bennett*, 360 U.S. 471, 3 L. Ed. 2d 1375, in support of their position that the order of the lower Court of November 17, 1961, is appealable. We respectfully submit that these cases are not authority for that position.

In *Bryan* the judgment of the lower Court was vacated because the statute attacked had been repealed and the case had become moot. The case as reported does not indicate that the question of the appealability of the lower Court's order was either raised or decided. There is no indication that the question of the appealability of the order was raised or decided in either *Windsor* or *Bennett*. We do not believe that the action taken in any particular case is authority for its propriety unless the specific issue was raised. Footnote 50 of this Court's opinion in *Monroe* v. *Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, states in part:

> "The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a 'person' within the meaning of Sec. 1983, no inference to the contrary can any longer be drawn from those cases."

We, therefore, respectfully submit that the cases cited by counsel for Appellants are not authorities in support of their position and that the appeal in this case should be dismissed.

This appeal should be dismissed as not within the jurisdiction of this Court because the United States District Court from which this appeal was taken did not have jurisdiction of this cause under 28 U.S.C., Section 2281.

The gist of Appellants' action is now and has always been an effort to stop the State Court prosecutions of the self-styled Freedom Riders. This necessarily resolves itself into purely factual issues as to whether the various persons arrested were or were not guilty of a breach of the peace which justified the arrests. None of them was arrested under the segregation statutes attacked in the case. (Exhibits 32, 33, 34 & 35).

The Mayor of the City of Jackson testified that he had forgotten that the city ordinance attacked in this case was in existence until this hearing, and that no instructions had been given city police with respect to controlling the use of bus or railroad terminals by either race. (R. 274). He testified that there was no objection to members of the colored race using facilities designated as reserved for members of the white race. (R. 275). He testified that there had been no arrests or prosecutions in the City of Jackson under any of the segregation statutes or the ordinance attacked in this case. (R. 276).

W. D. Rayfield, Chief of Police, testified that no person had been arrested in Jackson for using any particular facility and that no arrests had been made under the city ordinance attacked. (R. 280-281).

Joe T. Patterson, Attorney General of Mississippi, testified that trains and planes in this State are integrated and that no effort is made to segregate public transportation facilities in Mississippi. (R. 332). He testified that in his fourteen years as Attorney General and Assistant Attorney General he has neither prosecuted nor threatened to prosecute under any of said segregation statutes. (R.

332 & 338). He testified that said segregation statutes have not been enforced in Mississippi for many years and that no Negroes have been arrested for their use of any transportation facilities. (R. 337 & 342).

Appellants' witnesses, Renegar, Dobbins, Pickle and Turner, testified that no effort is made in the City of Jackson to control the action of Negroes either in the terminals or on carriers. Renegar (R. 500-502); Dobbins (R. 114-115 & 518); Pickle (R. 119-120); Turner (R. 160-161).

It is most significant that the Appellants showed no arrest of any person in the City of Jackson prior to April, 1961, when the Freedom Riders made their much publicized invasion. It is inconceivable that in a City of 150,000 people, almost equally divided between white and colored, that the Appellants could not have shown arrests and prosecutions of colored people if any effort were being made to enforce the segregation statutes and ordinance complained of.

This leaves solely the question of the arrests of the Freedom Riders. At the times of these arrests both white and colored people were arrested in the same locality for the same reason. Renegar (R. 90 & 100-101); Rayfield (R. 287); Ray (R. 361 & 373). The fact that neither race, color nor location had anything to do with these arrests is made clear by Appellants' witness Ray's testimony:

> "Q. I'll ask you whether or not in practically every instance there were members of both races arrested in exactly the same location.
>
> "A. That's correct.
>
> "Q. I want to ask you whether the race or color of any individual arrested had anything to do with whether or not that person was or was not arrested.
>
> "A. No, sir, did not." (R. 373)

The only issue, therefore, raised by this action is whether the arrests of the Freedom Riders were justified under the

facts and circumstances then existing. The fact that the prosecution of the Freedom Riders in the State Court is the real issue is demonstrated by the allegations of the complaint and Jurisdictional Statement, paragraph 4 of the original complaint alleged that the class represented by the Appellants was composed of Negro citizens and residents of the State of Mississippi.

Paragraph 4 of the amended complaint alleged that this action was brought by the Appellants on behalf of themselves and on behalf of "*other Negroes* similarly situated". Realizing that this class was not large enough to cover the Freedom Riders, who were composed of both white and colored people, the Appellants, on page 21 of their Jurisdictional Statement, re-defined the class involved as follows:

> "The class, therefore, consists of *persons* threatened by the segregation statutes or ordinances and practices (including arrest and prosecution for breach of the peace) of the State and the City of Jackson . . .".

Footnote 7, on page 21 of the Jurisdictional Statement, explains this belated amendment of the class involved in this litigation because the evidence disclosed that white persons, as well as Negroes, had been arrested. Therefore, we submit that it is apparent that the real and only controversy involves the propriety of the arrest of the white and colored Freedom Riders. This has nothing to do with the segregation statutes and does not involve discrimination in any way. We respectfully submit that these factual questions as to the propriety of those arrests under admittedly constitutional statutes are not proper issues for a three-judge Court. We raised this issue in the lower Court by motion to dissolve the three-judge Court. Where it appears that the three-judge Court did not have juris-

diction of this controversy, there would be no right to maintain this direct appeal to this Court.

In *Booker* v. *State of Tennessee Board of Education*, U.S.C.A. 6th, 240 F. 2d 689, Cert. Den. 353 U.S. 965, 1 L. Ed. 2d 915, the plaintiffs alleged discrimination under certain Tennessee statutes and sought to enjoin the Board of Education from refusing to admit plaintiffs to Memphis State College. The District Court held that the gist of the controversy was factual involving alleged discrimination under the Fourteenth Amendment and declined to take steps to convene a three-judge Court. In affirming this action of the District Court, the Court of Appeals said:

> "Plaintiffs contend that under the Federal Constitution, particularly the Fourteenth Amendment, the validity of the Tennessee segregation statutes and state constitution was directly involved and a three-judge court was therefore required. *However, the gist of the controversy was factual, namely, the existence of alleged discrimination under the Fourteenth Amendment.*"
>
> • • •
>
> "As the District Court had jurisdiction it properly proceeded with the trial. The principal issue was factual, namely, whether continuation of discrimination prohibited by the equal protection clause of the Fourteenth Amendment was contemplated by the proposed plan."

In *Beal, et al* v. *Holcomb, Mayor of the City of Houston*, U.S.C.A. 5th, 193 F. 2d 384, cert. den. 347 U.S. 394, 98 L. Ed. 1114, the complaint alleged that the plaintiffs were denied the right to use the municipal golf courses because they were members of the Negro race. It further alleged that they were denied said rights under certain Texas stat-

utes, and they sought an injunction predicated on the unconstitutionality of said statutes. The Court held that it was not a proper case for the convening of a three-judge Court in that it involved primarily the question of discrimination under the Fourteenth Amendment to the Federal Constitution.

In *Sealy* v. *Department of Public Instruction of Pennsylvania,* U.S.C.A. 3rd, 252 F. 2d 898, Cert. den. 356 U.S. 975, 2 L. Ed. 2d 1149, the Court said:

> "Mere attack on regulations or method of enforcement of a statute is not sufficient to justify the interposition of a three-judge court. Ex parte Bransford, 1939, 310 U.S. 354, 60 S. Ct. 947, 84 L. Ed. 1249, William Jameson & Co. v. Morgenthau, 1939, 307 U.S. 171, 59 S. Ct. 804, 83 L. Ed. 1189."

In *Ex parte Bransford,* 310 U.S. 354, 84 L. Ed. 1249, the Supreme Court of the United States said:

> "Jurisdiction, properly assumed, may be lost by the special court, when it appears that a prerequisite such as need for relief against state officers is lacking. Even where the statute is attacked as unconstitutional, Sec. 266 is inapplicable *unless the action complained of is directly attributable to the statute.* There is no indication that Congress sought by Sec. 266 to have every attack on the constitutionality of a state statute determined by a three-judge court."

In *Phillips* v. *United States,* 312 U.S. 246, 85 L. Ed. 800, the Court said:

> "But the enforcement of a 'statute' within the meaning of Sec. 266, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness.

> As Mr. Justice Cardozo said of a related problem affecting the business of the federal courts, 'we do not travel back so far.' Gully v. First National Bank, 299 U.S. 109, 116, 81 L. Ed. 70, 74, 57 S. Ct. 96."
>
> • • •
>
> "If the Governor's action is subject to restraint in the District Court, the procedural road to be taken is the normal course of litigation in a federal district court and not the short cut of Sec. 266."

In the case of *Wichita Falls Junior College Dist. v. Battle*, U.S.C.A. 5th, 204 F. 2d 632, Cert. den. 347 U.S. 974, 98 L. Ed. 1113, the Court said:

> "The relief prayed was that the defendants be enjoined from excluding plaintiffs from admission to the college as students upon the ground of their membership in the Negro race, and that a statutory three-judge court be convened *for the purpose of determining the constitutionality of the provisions of the constitution and statutes of Texas which require racial segregation in State educational institutions.*"
>
> • • •
>
> "*. . . the question for decision is merely whether the policies, usages and customs of the appellants actually do discriminate against the appellees on account of their race and color in violation of the aforesaid Equal Protection Clause. Such an issue is a factual one and obviously does not address itself to a three-judge court.*"

We, therefore, respectfully submit that the lower Court, as a three-judge Court, did not have jurisdiction of this cause and that, therefore, this appeal from said Court should be dismissed.

This appeal should be dismissed because the Appellants have no standing to litigate the constitutional issues presented because of the non-justiciability of Appellants' claims.

We have already pointed out that the segregation statutes attacked in this case have not been enforced for many years. This is emphasized by the fact that the three Appellants have been residents of Jackson, Mississippi, from fifteen to twenty years, and none of them have been threatened with arrest or prosecution under any of said statutes or the city ordinance. Broadwater (R. 42); Jacob (R. 53); Bailey (R. 73). Neither the City of Jackson nor any of its officials has ever refused either of them anything that he wanted to do. Typical of the testimony of the Appellants is that of Jacob:

> "Q. You have never been threatened with arrest or prosecution for violation of any of those statutes or that ordinance?
>
> "A. No.
>
> "Q. And never denied any right, privilege or immunity you claim under any of those statutes or that ordinance?
>
> "A. No.
>
> "Q. You have never been denied the right to do anything by the officials or any officer of the City of Jackson that you wanted to do, have you?
>
> "A. No, I haven't." (R. 53-54)

Bailey testified:

> "Q. Have you ever been denied any right, privilege or immunity which you sought under any of these statutes or ordinances complained of in this action?
>
> "A. No, I haven't myself." (R. 72)

The fact that these colored Appellants are registered voters and exercise that right in Jackson is additional evidence that this City does not attempt to discriminate against its colored citizens in any manner. Broadwater (R. 40); Jacob (R. 52); Bailey (R. 71).

The fact that these Appellants want to stop the prosecutions of the Freedom Riders in the State Court does not give them standing or an interest in the controversy which entitles them to an adjudication of the issues. This case presents an unusual situation in that the Appellants were neither arrested nor threatened with arrest. None of those arrested or threatened with arrest were offered as witnesses or made parties to this action. The state officials in control of the litigation of the State Court were not made parties to this action. Notwithstanding these facts, the Appellants seek to enjoin that State Court litigation. We find this difficult to comprehend when we realize that the State Court litigation is the one and only place where the rights of the Freedom Riders, constitutional and otherwise, can be finally determined. The Appellants have no more right to litigate those issues for the Freedom Riders than any other citizen who has merely an academic interest in the issues involved.

In *Poe* v. *Ullman*, decided June 19, 1961, 367 U.S. 497, 6 L. Ed. 2d, Adv. Sheet No. 5, page 989, this Court, speaking through Mr. Justice Frankfurter, held that the existence of a State statute and the allegation that the principal law enforcement officer of the State intends to prosecute any offenses against Connecticut law, does not constitute that immediate harm or immediate threat of harm to justify a suit by a citizen who has not been actually arrested or threatened with arrest where the facts disclose that the State statute has not been enforced for many years, and said:

"Appellants' complaints in these declaratory proceedings do not clearly, and certainly do not in terms, allege that appellee Ullman threatens to prosecute them for use of, or for giving advice concerning, contraceptive devices. The allegations are merely that, in the course of his public duty, he intends to prosecute any offenses against Connecticut law, and that he claims that use of and advice concerning contraceptives would constitute offenses. The lack of immediacy of the threat described by these allegations might alone raise serious questions of non-justiciability of appellants' claims. See United Public Workers v. Mitchell, 330 US 75, 88, 91 L ed 754, 765, 67 S Ct 556."

• • •

"What was said in another context is relevant here. 'Deeply embedded traditional ways of carrying out state policy . . .'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.' Nashville, C & St. L. R. Co. v. Browning, 310 US 362, 369, 84 L ed 1254, 1258, 60 S Ct 968.

"The restriction of our jurisdiction to cases and controversies within the meaning of Article 3 of the Constitution, see Muskrat v. United States, 219 US 346, 55 L ed 246, 31 S Ct 250, is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional questions. The policy reflected in numerous cases and over a long period was thus summarized in the oft-quoted statement of Mr. Justice Brandeis: 'The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Ash-

wander v. Tennessee Valley Auhtority, 297 US 288, 341, 346, 80 L ed 688, 707, 710, 56 S Ct 466 (concurring opinion). In part the rules summarized in the Ashwander opinion have derived from the historically defined, limited nature and function of courts and from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity."

• • •

"These considerations press with special urgency in cases challenging legislative action or state judicial action as repugnant to the Constitution. 'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.' Parker v. County of Los Angeles, 388 US 327, 333, 94 L ed 144, 147, 70 S Ct 161."

• • •

"The various doctrines of 'standing,' 'ripeness,' and 'mootness,' which this Court has evolved with particular, though not exclusive, reference to such cases are but several mainifestations—each having its own 'varied application'—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, *only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.*"

• • •

"It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitution-

ality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting."

• • •

"The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication."

• • •

"Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the *litigants* of denying *them* the relief sought. Both these factors justify withholding adjudication of the constitutional issue raised under the circumstances and in the manner in which they are now before the Court.

"Dismissed."

We respectfully submit that these Appellants have not shown the required interest or standing to entitle them to the injunctive relief sought by this action, and this Court, in its per curiam opinion in this case of December 18, 1961, recognized this situation and stated:

"A federal injunction to stay state criminal proceedings is an extraordinary remedy. Cf. *Douglas* v. City of Jeannette, 319 U.S. 157; Ex parte Young, 209 U. S. 123. In addition to the considerations normally attending an application for such relief, a serious question of standing is presented on this motion, in that it appears that the movants themselves are not being prosecuted in the Mississippi courts."

We respectfully submit that this appeal should be dismissed.

In the alternative, the order appealed from should be affirmed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The relief sought in this case involves an interpretation of our breach of the peace statutes enacted in 1960 which have not been presented to or construed by the Supreme Court of Mississippi. The unsubstantiated allegations of counsel for Appellants that these statutes are being used to enforce segregation of the races is an issue which should first be presented to the Supreme Court of Mississippi. It is certainly not an issue to be determined by a three-judge Court sitting in equity without giving the Courts of Mississippi an opportunity to construe the statutes or the actions taken thereunder.

The situation presented by the organized and publicized trips of the Freedom Riders to Jackson does not actually involve race relations or discrimination. Jackson was confronted with its obligation to maintain law and order under circumstances which aroused extreme resentment among the people of the City and State. We doubt if General Sherman was any more unpopular during his march through Georgia. The visits of these same people in an adjoining State had resulted in violence and bloodshed. (R. 296 & 409-430). Jackson was determined that this would not be repeated in our City and State. In order to maintain law and order, our police required our visitors and our local citizens not to congregate in public places. Members of both races were treated exactly the same. Rayfield (R. 290, 293 & 295). The police had been advised in advance that the Freedom Riders had make arrangements to stay

at Tougaloo College near Jackson. The City had cars available at the bus terminal to take them safely to their destination if they had been willing to go. (R. 308). Within a matter of months, the Freedom Riders had left a record in judicial decisions. *United States* v. *U.S. Klans, et al.* U.S.D.C. Ala., 194 F. Supp. 897; *In the Matter of the Application of Elizabeth Porter Wyckoff*, U.S.D.C. Miss., 196 F. Supp. 515. In the *Klans* case, District Judge Johnson, referring to the activities of the Freedom Riders, stated:

> "... the rights of the public to be protected from the evils of their conduct is a greater and more important right."

The efforts on the part of Appellants to show discrimination in Jackson were wholly unsubstantial. For instance, their witness Evers testified that he had been Field Secretary in Jackson for the N.A.A.C.P. since 1954 and has occasion to use the Jackson airport from fifteen to twenty times a year. (R. 140). On one occasion an unidentified waitress refused to serve him in the restaurant. (R. 141). He did not report this incident to anyone in authority at the airport or with the City. (R. 154). Appellants' witness, Dr. Jane McAllister, testified that she had commuted daily by bus from Jackson to Vicksburg, Mississippi for ten years. (R. 311). As a colored person, she had always sat where she wished on the bus. (R. 325). On one occasion during that ten-year period she was treated rudely by a Jackson policeman. (R. 314-315). We submit that these isolated instances emphasize the absence of discrimination generally. The organization which is financing this litigation, with the resources at its command, could have easily shown more discrimination against red-headed people than it did against Negroes in this case.

We submit that the action of the lower Court in retain-

ing jurisdiction and applying the doctrine of abstention was eminently correct under numerous recent decisions of this Court. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 3 L. Ed. 2d 1152; *City of Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 3 L. Ed. 2d 562; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 3 L. Ed. 2d 1058; *N.A.A.C.P.* v. *Bennett*, 360 U.S. 471, 3 L. Ed. 2d 1375. Annotation on discretion of Federal Court to remit relevant State issues to State Court, 3 L. Ed. 2d 1827.

Counsel for Appellants state that the *Harrison* case is not applicable because the Court was assured that there would be no enforcement of the segregation statutes involved pending final adjudication of the issues. Every law enforcement officer who took the stand in this case, including the Attorney General of Mississippi, the Mayor of Jackson, and the Chief of Police, testified that neither the City nor the State was enforcing the segregation statutes attacked in this case and had not done so for many years. We fail to see the alleged distinction between this case and the *Harrison* case.

We respectfully submit that the appeal in this case should be dismissed, and in the alternative, the order of the lower Court should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 643

SAMUEL BAILEY, ET AL,

Appellants,

v.

JOE T. PATTERSON, ET AL.,

Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this — day of January, 1962, I served a copy of the "Motion to Dismiss Appeal or in the Alternative to Affirm on behalf of the City of Jackson, Mississippi, its Mayor, Commissioners, and Chief of Police, Appellees" upon counsel for all parties to the case at the addresses indicated below, by depositing copies of same, addressed to each as indicated, in the United States mail, postage prepaid:

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(867-2)

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SAMUEL BAILEY, *et al.*,

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Appellees.

REPLY TO APPELLEES' MOTIONS TO DISMISS OR TO AFFIRM

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IN THE

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No. 643

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Appellants,

—v.—

JOE T. PATTERSON, *et al.*,

Appellees.

REPLY TO APPELLEES' MOTIONS TO DISMISS OR TO AFFIRM

Appellants have received Motions to Dismiss or Affirm, filed by appellees, City of Jackson, Mississippi, its Mayor, Commissioners and Chief of Police, by appellees Greyhound Corporation and Continental Southern Lines, Inc., and by appellee Attorney General of Mississippi. Appellants herein reply to these Motions reserving the right to file further replies to any other Motion to Dismiss or Affirm which may be filed by any of the other parties hereto.*

I.

Motion to dismiss or affirm filed by the City of Jackson, Mississippi, its Mayor, Commissioners, Chief of Police, and by the Attorney General of Mississippi.

A. *Appellants' Claims Are Justiciable*

The essence of the motion by appellee city and its officials consists of the position, utterly unsupported in the record,

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* Time to file Motion to Dismiss or Affirm has expired.

that Jackson, Mississippi is not enforcing segregation in intrastate and interstate travel or appurtenant terminal facilities. If it were necessary, the Court could rely solely on the notorious fact that Mississippi and all of its subdivisions are obedient to the precept of 17 Miss. Code Ann. §4065.3 which exhorts "The entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor . . . mayor . . . chiefs of Police, policemen . . . to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in . . . public waiting rooms, . . . " This provision further incorporates by reference the massive, pervasive "Resolution of Interposition" which purports to negate federal prohibitions against state enforcement of racial segregation. Notice of the policy of the State of Mississippi in connection with its University was recently taken by the Fifth Circuit in *Meredith* v. *Fair*, 30 U.S. Law W. 2347-2348:

> This case was tried below and argued here in the eerie atmosphere of never-never land Counsel for [University] argue that there is no state policy of maintaining segregated institutions of higher learning and that the court can take no judicial notice of this plain fact known to everyone.
>
> We take judicial notice that the state of Mississippi maintains a policy of segregation in its schools and colleges.

But this Court need not rely on judicial notice alone. The record thoroughly substantiates appellants' contention that Mississippi and the City of Jackson enforce racial segregation in interstate and intrastate travel facilities, in waiting rooms, in connection with rail, bus, and air transportation, against local residents and out of state travelers, against

"freedom riders" and ordinary travelers. Moreover, segregation is enforced in obedience to statutes of the state requiring segregation, and an ordinance of the city requiring segregation, and, in apparent effort to escape federal interdiction, pursuant to breach of the peace laws. The enforcement, and immediate threat inflicted by Mississippi in all these ways leaps to the eye, not only through express evidence inscribed in the record, but by means of the tenacious and evasive posture of Mississippi officials and officers of the City of Jackson who seek somehow to perpetuate segregation through taking the position that they are not enforcing it.

At the close of the trial in the court below counsel for Jackson City Lines, the local bus company, addressed the Court with a plea that it enter an injunction so that Jackson City Lines could cease segregating under compulsion of statutes and ordinances without subjecting itself to the penalties of these duly enacted requirements that racial segregation be maintained.

> We are purely a local company operating only in the City of Jackson. The same identical statute that required the railroad and the bus companies to put up a sign, in another part of the same section requires us to do that exactly which we are doing. The city ordinance is an exact copy of the state law, which required us to do that which we are doing. I want to make this statement now because I think that the responsibility for what may happen should be shifted to some extent from my shoulders. The Illinois Central Railroad and both the bus lines have, according to the testimony here—and I have every reason to believe every word of it—ceased to make any effort to enforce any of these statutes except to have the signs there which they have no control of. I have the signs in

> buses, and those drivers are instructed just as this driver told you, because I am the man that wrote the instructions to park the buses in the event someone fails to operate on the basis of those signs. . . . If you would tell me this afternoon that in your opinion those statutes are unconstitutional, I would take the signs out of my buses and tell my buses to operate like the railroads and the other two bus companies.
>
> • • •
>
> I don't think any injunction should issue against me, but I need some relief because if I go pull the signs out of the buses, I am pulling them out in the face of the statute and an ordinance created by my own rate-making body, and I am in trouble either way I go (R. 696-698).

Yet the City of Jackson which insists that segregation is not being enforced, through its attorney opposed this request of the bus company that it be enjoined from segregating:

> I certainly would like to be heard before you act on any such suggestion as made to the Court. On behalf of the City of Jackson, I strenuously object to any injunction issuing in this case. . . . (R. 697).

And the State of Mississippi through its counsel also urged:

> We too oppose any issuance of any injunction in this case. . . . (R. 698).

The appellants in this case had protested the segregation here enforced years ago. Yet, a local Jackson official of another one of the carriers (Greyhound) wrote to its president that it too was coerced by state law:

> I will say this, if the N.A.A.C.P. does start using the waiting rooms at any Terminal in Jackson, Mississippi there will be plenty of trouble, because the police department has the backing of the City Officials and it appears they will go all the way to keep the races segregated in Mississippi (R. 204; Plaintiffs' Exh. No. 6).

And counsel for Greyhound in its Motion to Dismiss or Affirm recently filed with this Court, stated on p. 4 that:

> The testimony is without dispute that the signs were placed over the entrance doors at the two terminal buildings pursuant to the provisions of Chapter 258, Laws of 1956, Mississippi Legislature, Regular Session. Violation of these statutes requiring the posting of these signs and the corresponding City of Jackson ordinance carries a severe penalty.

The letter quoted above was written before such a thing as freedom riders existed. Indeed, appellants respectfully suggested that "freedom riders" probably never would have come into existence if Mississippi and appellee carriers had been obedient to long-established requirements of federal law. See *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Morgan* v. *Virginia*, 328 U.S. 373 (1946); *Henderson* v. *United States*, 339 U.S. 816 (1950); *NAACP* v. *St. Louis-San Francisco Ry.*, 297 ICC 335 (1955); *Keys* v. *Carolina Coach Co.*, 164 M.C.C. 769 (1955); *Flemming* v. *South Carolina Electric and Gas Co.*, 224 F. 2d 752 (5th Cir. 1955), appeal dismissed, 351 U.S. 901; *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), affirmed, 352 U.S. 903 (1956); *Boynton* v. *Virginia*, 364 U.S. 454 (1960).

The suggestion that this suit arises from capricious, arbitrary activities of "freedom riders" belies the record.

Appellant Bailey in this case testified concerning the arrest of a co-worker seated next to him on a Jackson City bus. This co-worker obviously was not and, it is not alleged that he was, a freedom rider (R. 250). Moreover, other arrests of local residents occurred on Jackson City buses. They also were merely local travelers, not freedom riders (R. 342, 347, 353). Long before anyone ever heard of freedom riders, the witness Evers was required to be segregated in the local air terminal (R. 312-315). And see all of the other testimony of arrests and prosecutions and other intimidation by state officials in Mississippi of persons who with one exception, could not be characterized as freedom riders. (Jurisdictional Statement of Appellants, pp. 16-18.) Beyond this, the so-called freedom riders were obviously not guilty of any crime and were unconstitutionally deprived of their federal constitutional rights. See appellants' Exhibit Nos. 32, 33, 34 and 35 (R. 532, 536, 541-542, 544). *Garner* v. *Louisiana*, 7 L. ed. 2d 207; *Thompson* v. *City of Louisville*, 362 U.S. 199; *Lewis* v. *Greyhound Corp.* (M.D. Ala., C.A. No. 1724-n, November 1, 1961, not yet reported).

It is quite untrue, as appellees City of Jackson and its officials urge, that:

> The gist of Appellants' action is now and has always been an effort to stop the State Court prosecutions of the self-styled Freedom Riders. This necessarily resolves itself into purely factual issues as to whether the various persons arrested were or were not guilty of a breach of the peace which justified the arrests. None of them was arrested under the segregation statutes attacked in the case (Exhibits 32, 33, 34 & 35). (Motion of City to Dismiss or Affirm, p. 10.)

This case involves local residents and out of state travelers too, who have long been subjected to denial of constitu-

tional rights on all of the common carriers, air, rail and bus, local and interstate, in the City of Jackson and elsewhere in Mississippi. While other citizens of the United States who have protested this unconstitutional deprivation of rights are members of this class seeking the benefit of the decree in this cause, the complaint and prayer go far beyond the "freedom riders" who are, appellants submit, a by-product of the Mississippi policy proclaimed in 17 Miss. Code Ann. §4065.3 and the Mississippi Statutes, extracts from which occupy pages 7-11 of the appellants' Jurisdictional Statement.

It is, therefore, frivolous to suggest, as appellees do on page 16 of the Motion to Dismiss or Affirm, that "Appellants have no standing to litigate the constitutional issues presented because of the non-justiciability of Appellants' claims." As this Court held in *Evers* v. *Dwyer*, 358 U.S. 202:

> We do not believe that appellant, in order to demonstrate the existence of an "actual controversy" over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability. See Gayle v. Browder, 352 US 903; 1 L ed 2d 114, 77 S Ct 145, affirming the decision of a three-judge District Court (Ala) reported at 142 F Supp 707.

Moreover, these statutes are not only being enforced through the arrest and prosecution of Negroes with sufficient temerity to challenge segregation, but through signs

which direct the races to different waiting rooms, signed "By order of Police Department" (R. 218, 259, 277). Also, there is the posting of signs by the various carriers obedient to state law. As the Court of Appeals for the Fifth Circuit held in *Baldwin* v. *Morgan*, 287 F. 2d 750, 755 (5th Cir. 1961), "when in the execution of that public function [a carrier] is the instrument by which state policy is to be and is effectuated, activity which might otherwise be termed private may become state action within the Fourteenth Amendment." Police posting of racial signs outside of the terminals in question is far more state action than occurred in *Baldwin* v. *Morgan, supra,* where "the state [did] not physically post the signs, but it [did] so just as effectively through the instrument of the Terminal." 287 F. 2d at 755. Indeed, in *Baldwin,* the Court of Appeals found "The very act of posting and maintaining separate facilities when done by the Terminal as commanded by these state orders is action by the state." 287 F. 2d at 755. Not only terminals, but carriers as well posted signs in Jackson.

The abstract quotations from cross-examination in the City of Jackson's Motion to Dismiss or Affirm which appear on page 16 of said Motion are meaningless when taken out of context. The obvious full meaning of the witness' testimony was that they sought to avoid the harassment, obloquy and hardship which experience told inevitably would follow should they make an effort to ride in a nonsegregated manner. The Constitution does not require that one subject himself to arrest when it is known that arrest inevitably will follow in order to file an action in the United States court to secure one's constitutional rights. *Evers* v. *Dwyer*, 358 U.S. 202; *Baldwin* v. *Morgan*, 251 F. 2d 780 (5th Cir. 1958).

Appellees, City of Jackson, do not rely properly on this Court's decision in *Poe* v. *Ullman*, 6 L. ed. 2d 989, 996, for

'n that case, as the opinion of Mr. Justice Frankfurter stated, the suit was not brought by "one who [was] himself immediately harmed or immediately threatened with harm by the challenged action." See Motion of City of Jackson, p. 19. The multitudinous arrests occurring over a long period of time in every variety of facility, the intricate network of statutes and the ordinance requiring segregation, the refusal of the Attorney General of Mississippi to acknowledge the unconstitutionality of state segregation laws (R. 527) and his avowal, when asked whether and under what circumstances he would enforce these laws, that "If conditions should arise to such a point that I thought it was necessary to bring them into effect, yes." (R. 515), demonstrates that Mississippi presently continues as it always has, to enforce segregation in every aspect of state life, including local and interstate travel.[1] The two-step operation of prosecuting for breach of the peace, rather than for failure to segregate per se, does not at all vitiate the monolithic state policy declared in 17 Miss. Code Ann. §4065.3. In fact, petitioners respectfully submit, it is difficult, if not impossible, to conceive of a case in which enforcement of a state policy at all points is more immediate a threat to one who seeks to enjoy constitutional rights.

So far as "freedom riders" are concerned, the continued daily prosecution of citizens from outside the state, who on the detailed evidence of this record, are being convicted in the Mississippi courts for what under *Thompson* v. *City of Louisville*, 362 U.S. 199 and *Garner* v. *Louisiana*, 30 U.S. L. Week 4070, is obviously not a crime, in violation of

---

[1] Q. Have you [the Attorney General] ever made any public announcement to the effect that these laws referred to in the Complaint would not be enforced?

* * *

A. Certainly not (R. 527).

Fourteenth Amendment rights, is a daily advertisement by Mississippi to everyone that it intends to continue enforcing racial segregation in travel.

The threat is real, it is immediate, and appellants have no relief but by judicial enforcement of long established constitutional rights.

B. *The Order Below Is Appealable*

Appellants submit that in the jurisdictional statement they adequately set forth reasons why the order below is appealable and that appellees, City of Jackson and its officials, have not in any wise distinguished the cases cited (*Bryan* v. *Austin*, 148 F.Supp. 563 (E.D.S.C. 1957), app. dism. as moot, 354 U.S. 933 (1957); *Government & Civic Employees Organizing Comm., CIO* v. *Windsor*, 353 U.S. 364 (1957), per curiam; *NAACP* v. *Bennett*, 360 U.S. 471 va'g automatic remand to state court for consideration in light of *Harrison* v. *NAACP*, 360 U.S. 167), except, essentially, to suggest that the question of appealability "was [not] raised or decided" in said cases (Motion to Dismiss or Affirm, p. 9). Appellants submit, however, that this consistent course of decision coupled with the policy of the jurisdictional statutes involved clearly supports appealability. It is the substance of the order rather than the terminology to which the statutes look. As this Court said in *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U.S. 188, 191-192:

> As in the *Enelow* case [293 U.S. 379] so here, the result of the District Judge's order is the postponement of trial of the jury action based upon the policies; and it may, in practical effect, terminate that action. It is as effective in these respects as an injunction issued by a chancellor. If the order be found to be erroneous, it will have to be set aside and the plaintiffs

> permitted to pursue their action to judgment. The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case. *The relief afforded by §129 is not restricted to the terminology used. The statute looks to the substantial effect of the order made.*[2] [Emphasis added.]

Obviously the substantial effect of the order below was to deny a temporary injunction no matter what the order was called. Appellants' motion for preliminary injunction was filed June 9, 1961. The hearing was delayed three months before a trial was held and oral arguments were completed upon the motion. The order of November 17th stayed proceedings for a "reasonable," but nevertheless, indefinite length of time. Its practical effect and therefore its legal effect has been to deny appellants relief for the indefinite future. The order constituted an adjudication of the question of preliminary relief. The motion for preliminary injunction is no longer *sub judice*. Failure to take jurisdiction of an appeal under circumstances such as these would result in an *ad hoc* episodic, inconsistent treatment of cases which are essentially alike.[3] For example, if the

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[2] See also *Romero* v. *Weakley*, 226 F. 2d 399 (C.A. 9), reversing 131 F. Supp. 818 (S.D. Cal.). There the district court retained jurisdiction of the case pending state court proceedings. The court of appeals held that the action of the district court was reviewable and said (226 F. 2d at 400): "All the parties also are agreed that the decision to refuse to consider the complaints are appealable. Apart from the agreement we hold these are appealable decisions." In a footnote to this statement, the court added: "Alternatively, appellant sought a writ of mandamus. Our remanding order is, in effect, such a writ."

[3] See note, *Judicial Abstention From The Exercise of Federal Jurisdiction*, 59 Colum. L. Rev. 749, 771-776, for a discussion of the technique of disposition where the principle of equitable abstention is applied.

District Court would choose to dismiss a complaint (which it has power to do), see, e.g., *Alabama Public Service Commission* v. *Southern Railway*, 341 U.S. 341; *Burford* v. *Sun Oil Co.*, 319 U.S. 315, instead of retaining jurisdiction during state court proceedings, its order would be appealable. But, appellees urge, if it "retains" jurisdiction the order is not. Since the two methods of disposition are, in effect the same, however, one should not produce consequences different from the other. The treatment suggested by appellees would frustrate congressional intent for three-judge courts were created to provide a swift method of final determination of the constitutionality of state or federal enactments. See 28 U.S.C. §2284(4); 28 U.S.C. §1253. *Radio Corporation of America* v. *United States*, 95 F.Supp. 660 (N.D. Ill.), affirmed, 341 U.S. 412.

C. *The United States District Court From Which This Appeal Was Taken Had Jurisdiction of This Cause Under 28 U.S.C. §2281*

Appellees advance the argument that this was not properly a case for a three-judge federal district court, urging that "[t]he gist of Appellants' action is now and has always been an effort to stop the State Court prosecutions of the self-styled Freedom Riders. This necessarily resolves itself into purely factual issues as to whether the various persons arrested were or were not guilty of a breach of the peace which justified the arrests" (Motion to Dismiss or Affirm of City, p. 10). This, however, is clearly not the case, and a cursory glance at the record indicates that appellants have sought to enjoin racial segregation enforced by officers of the State of Mississippi under authority of a host of segregation statutes (see Jurisdictional Statement, pp. 6-11) and that such injunction has been sought on the ground of the unconstitutionality of the statutes (as well as, the record indicates, other grounds).

The amended complaint herein alleges:

> The jurisdiction of this Court is also invoked pursuant to provisions of Title 28, United States Code, Section 2281 and Section 2284. This is an action to enjoin the enforcement of certain statutes of the State of Mississippi requiring racial segregation on common carriers, and in waiting room and rest room facilities utilized by common carriers, and providing criminal penalties for carriers and persons refusing to abide by such segregation. The statutes sought to be enjoined are Title 11, Sections 2351, 2351.5 and 2351.7, and Title 28, §§7784, 7785, 7786, 7786-01, 7787, 7787.5, Mississippi Code Annotated (1942), and any other statute of the State of Mississippi requiring or permitting such segregation (R. 13).
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> • • •
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> The segregation complained of herein subjects plaintiffs and members of their class to daily public inconvenience, harassment, embarrassment, and arrest, and violates rights secured to plaintiffs and members of their class by the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution and Article 1, Section 8, Clause 3 (Commerce Clause) of the Federal Constitution and by the laws of the United States, Title 49, United States Code, §§3(1) and 316(d) (R. 21).

The prayer of the amended complaint seeks injunctive relief against state officers to prevent them from enforcing these state statutes requiring segregation on the ground of the unconstitutionality of said statutes (R. 21).

It is impossible to see how a complaint so sweeping in matters specifically directed against a host of transportation and waiting room segregation statutes can be narrowly

characterized as solely "an effort to stop State Court prosecutions of the self-styled Freedom Riders" by the motion to dismiss or affirm (Motion to Dismiss or Affirm, p. 10). The complaint falls squarely within the plain language of Title 28, §2281:

> An interlocutory . . . injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . , shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges. . . .

Regularly the courts have looked into the complaint to see whether a three-judge court should be convened.

> As the bill challenged the validity under the Federal Constitution of an order of an administrative board of the state, the district court had jurisdiction under §266, Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. ed. 659, 43 Sup. Ct. Rep. 353, and this court has jurisdiction on direct appeal. *Herkness* v. *Irion*, 278 U.S. 92, 93-94.

And see *Query* v. *United States*, 316 U.S. 486, 490:

> Here a substantial charge has been made that a state statute as applied to the complainants violates the Constitution. Under such circumstances, we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to §266. Stratton v. St. Louis S. W. R. Co., 282 US 10, 75 L ed 135, 51 S Ct 8; Ex parte Bransford, 310 US 354, 361, 84 L ed 1249, 1253, 60 S Ct 947.

Ex parte Bransford, on which Appellees rely, also turns on a construction of the complaint. In that case it was held that:

> It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction. 310 U.S. 354, 361.

This hardly is a case, as suggested in *Bransford*, where "a prerequisite such as need for relief against state officers is lacking. . . ." 310 U.S. at 361. Nor is it a case where the three-judge court statute is inapplicable because the action complained of is not directly attributable to the statute. 310 U.S. at 361. Here there are not only a host of segregation statutes, but a general, recently enacted legislative pronouncement, 17 Miss. Code Ann., §4065.3, which stridently exhorts state officers, from the highest to the lowest, to enforce the racial segregation policies of the State. And, even if recourse to the record were appropriate to ascertain whether, in view of the complaint and the prayer, three judges were required, here is a record replete with examples of enforcement and obedience to an unconstitutional set of statutes by carriers and citizens under threat of enforcement. See Part 1A, *supra*. That segregation has been enforced in other ways, pursuant to

ordinance and so forth, does not rob the three-judge court of jurisdiction which reaches to questions cognizable by one judge as well as three. *Sterling* v. *Constantin*, 278 U.S. 378.

II.

Motion of Greyhound Corporation and Continental Southern Lines to dismiss and/or affirm.

The essence of the Motion to Dismiss or Affirm by these interstate carrier appellees is that they have not enforced racial segregation and that they are obedient to the Interstate Commerce Commission Order in Docket No. MC-C-3358, dated September 22, 1961, effective November 1, 1961 (Motion to Dismiss or Affirm of Greyhound Corporation and Continental Southern Lines, pp. 2, 5). The record, however, contains numerous instances of segregation on carriers being enforced by agents of the carriers subservient to state law and in combination with persons acting under color of law, or individually. See Jurisdictional Statement, pp. 16-19. The avowal by these carriers that now, following the decisions in *Morgan* v. *Virginia*, 328 U.S. 373; *Boynton* v. *Virginia*, 364 U.S. 454 and *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769 (1955), the aforesaid Order of the Interstate Commerce Commission, as well as the decisions of this Court in *Mitchell* v. *United States*, 313 U.S. 80, and *Henderson* v. *United States*, 339 U.S. 816, they no longer require segregation of passengers or persons using their terminals, is hardly a ground for avoiding the injunction which appellants seek to obtain against them and, therefore, does not render insubstantial the issues presented by this appeal.

This Court recently held in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48, that cessation of alleged activity does not itself moot a case:

> The courts have an obligation, once a violation . . .[4] has been established, to protect the public from a continuation of the harmful and unlawful activities. A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit. See United States v. Oregon State Medical Soc., 343 U.S. 326, 333, 96 L. ed. 978, 72 S. Ct. 690.

This long has been the law. See *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 where following suit to enjoin violation of the Fair Labor Standards Act the employer voluntarily discontinued use of contracts which were the subject of the suit. The cause was held to be justiciable. Similarly, in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, where there was a disclaimer of intention to repeat practices against which an injunction was sought the case was held not moot. Of course, as suggested in the *W. T. Grant* case, "[t]he case may nevertheless be moot if defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" But, as stated there, "the burden is a heavy one." 345 U.S. 629, 633.

It might theoretically be established on some other record that these interstate carriers and their drivers and the managers of their terminals will not, in the future, direct Negroes and whites to separate parts of vehicles and terminals. But, a history over a period of years of repeated violations in the face of clear federal law does not instill confidence that at this juncture these appellees have become obedient to the Constitution and the Interstate Commerce Act. If they have, an injunction can do them no

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[4] The excised language refers to the antitrust laws, but, of course, is generally applicable.

harm. If they have not, appellants obviously need protection of the decree they have prayed for.

CONCLUSION

WHEREFORE, for the foregoing reasons, the appellants respectfully submit that this Court has jurisdiction in the instant case.

Respectfully submitted,

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